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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1994

DEL KIDD; JUDY KIDD, *Petitioners,*

v.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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Date: June 23, 1995

QUESTION PRESENTED

Whether the comprehensive nature of the Civil Service Reform Act of 1978, as amended, precludes a district court from granting equitable relief for alleged constitutional violations.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners Del and Judy Kidd respectfully request that a writ of certiorari be issued to review the judgement and opinion of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled proceedings on January 13, 1995.

REPORTS OF OPINIONS BELOW

The opinion issued in this case by the Court of Appeals for the Ninth Circuit has not been reported. It is reprinted in the appendix hereto on pages A-2 through A-11.[1] The opinion of the district court is also included in two Orders reprinted in the appendix on pages A-13 through A-27.

JURISDICTION

After exhausting their administrative remedies under the Civil Service Reform Act (CSRA), petitioners filed this suit in federal district court for the District of Nevada under the federal question statute, 28 U.S.C. § 1331, seeking: procedural

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[1] Documents reprinted in the appendix are referenced in this petition by a page number with the prefix A.

review and declaratory relief under the Administrative Procedures Act, 5 U.S.C. §§ 701-706; equitable relief based on alleged constitutional violations under the CSRA; and judicial review of the remedial scheme provided by the CSRA to determine its constitutional adequacy.

By Order dated November 25, 1992, the district court dismissed all claims presented, except one, for lack of jurisdiction. See: p. A-19. By Order dated October 14, 1993, the court granted leave to file an amended complaint, and in same Order, granted summary judgement in favor of the government for the one remaining issue. See: p. A-13. The case was timely appealed to the Ninth Circuit Court of Appeals where, by Memorandum filed January 13, 1995, the Ninth Circuit affirmed. See: p. A-2. By Order filed March 29, 1995, petitioner's petition for rehearing was denied and the suggestion for rehearing en banc was rejected. See: p. A-1.

STATUTES INVOLVED

The Civil Service Reform Act of 1978, Pub. L. 95-454, 92 Stat. 1111. (codified as amended in sections of 5 U.S.C.)

Those sections of the Act referenced in this petition are reprinted in the appendix beginning on page A-38.

STATEMENT OF THE CASE

Petitioner, Del Kidd, is an employee of the federal Bureau of Reclamation, an agency of the United States Department of the Interior, and has been a civil servant since 1970. On July 10, 1992, he and his wife filed this action in federal court in the District of Nevada.[2] The complaint stated

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[2] This suit was necessitated by the district court's refusal to conduct judicial review in conjunction with Kidd's previously filed tort suit (Ninth Circuit Case No. 91-15657, Supreme Court No. 93-1131, cert denied) and the Federal Circuit's refusal to

three claims of relief: procedural review of the grievance process established by the CSRA and declaratory relief under the Administrative Procedures Act if it was found that the process had been abused in this case; substantive review of the remedial scheme established by the CSRA to determine if it adequately protects the constitutional rights of federal employees; and a determination of whether that remedial scheme is compatible with the Constitution and legal precedent. The Kidds allege subject matter jurisdiction under the federal question statute, 28 U.S.C. 1331, the Administrative Procedures Act, and the CSRA.

The complaint alleged numerous wrongful actions taken by various employees of the Bureau and Department during the agency's processing of three grievances filed by Del Kidd.[3]

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conduct judicial review in conjunction with Kidd's claims of whistleblowing presented to the Merit System Protection Board and appealed to the Federal Circuit (Federal Circuit Case No. 9103546; Supreme Court No. 93-949. cert denied).

[3] Kidd's grievances involved the following: On April 10, 1989, after being harassed and receiving a Letter of Warning, Kidd filed a grievance against a division chief at the Yuma Projects Office (YPO) for continued harassment and against the Project Manager at the YPO for failing to address the harassment when he was made aware of it. Shortly after the grievance was received, the Project Manager summarily placed Kidd on administrative leave and gave him four days to decide between taking early retirement or a permanent transfer to the Regional Office in Boulder City, Nv. Kidd accepted the transfer under duress. But because he chose not to retire, he was detailed to the Bureau's Phoenix, Az., office for two months until the effective date of his transfer in July. When Kidd was detailed out of Yuma, he appointed his wife as his representative in his grievance and appeals.

Kidd was advised by the Secretary's personnel office that he should amend his grievance by citing the administrative leave, detail, and transfer as further evidence of harassment. Kidd

Most notably, the complaint alleged that, counter to regulation, federal officials involved in the administrative processing of Kidd's grievances and appeals:

- summarily placed Kidd on administrative leave without cause and without regulatory authority.[4]

- failed to provide an impartial deciding official by assigning final resolution of Kidd's grievance to an official known to have been directly involved in the matter being grieved.[5]

- changed the charges against Kidd midway through the grievance process from those of poor performance to those of poor conduct.[6]

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amended the grievance and, as permitted by regulation, elevated it first to the Commissioner and then to the Secretary. The Secretary refused to get involved and remanded it back to the Commissioner. The Bureau then refused to include the other actions in the grievance and, without regulatory authority and with no input from Kidd, created a second grievance and then assigned an official who had participated in the taking of the personnel actions to serve as the deciding official for the second grievance. A year later, shortly after Kidd had filed suit in federal court under the Freedom of Information Act seeking documents to use in his grievance, the Bureau ordered him suspended for 14 days and Kidd filed yet his third grievance, claiming reprisal for his having exercised his appeal rights and reprisal for whistleblowing.

[4] Regulation allows the use of administrative leave only under extreme circumstances such as when the employee presents a physical threat to other employees.

[5] Regulation requires that the deciding official be a person who has not been involved in the matter being grieved and is not subordinate to anyone who was involved.

[6] When an employee is to be disciplined for poor performance, regulation requires that he be warned of his poor performance, usually during a performance review, and be given an opportunity to improve. When an employee is to be

- claimed at one time that Kidd's transfer was not a disciplinary action and then reversed that position in order to justify Kidd's 14-day suspension.[7]

- altered Kidd's grievance file sent to the Office of Hearing and Appeals (OHA) and prejudiced the file with documents outside the scope of the grievance causing the deliberate delay of the scheduling of Kidd's hearing before the OHA for six months and the delay of the issuance of that Office's final decision for a full year.

- generally failed to allow Kidd free use of the grievance process by failing to allow Kidd to amend his grievance, narrowing the issues presented in the grievances, failing to allow Kidd to properly elevate his grievance, and disregarding time requirements and delaying the process.

In a grievance process that should normally have taken only a few months, Kidd's grievance filed, in April, 1989, was not finally decided by the Bureau until April, 1992.

The complaint further alleged that when Kidd reported these prohibited personnel practices and official wrongdoing the Office of Special Counsel (OSC), it failed to investigate the administrative leave and detail, and failed to conduct investigations sufficient to determine the merits of Kidd's claims.

Kidd's complaint to the OSC included claims that he had been denied the process due him under the law and regulation and that he had been disciplined for having reported

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disciplined for poor conduct, he must be given a written notice, be advised of his right to an attorney, etc. At the time Kidd was placed on administrative leave and detailed out of his position in Yuma, he had just been given a fully successful performance rating and he was not given prior written warning of the personnel actions.

[7] For the type of actions cited as reasons for Kidd's suspension, regulations allow for only a letter of reprimand or a 5-day suspension for the first offense. A 14-day suspension is allowed only for the second offense.

the wrongdoing to the Secretary and for having hosted a meeting with fellow employees and a member of Congressman Udall's staff to report mismanagement and abuse of authority at YPO.

The OSC's investigation into Kidd's first complaint consisted of one phone call to Kidd and one phone call to a Bureau personnel employee. The OSC then determined that, based on information provided by the agency, it could find no wrongdoing and that there was no basis for further inquiry. See: p. A-28 and A-31.

The OSC's investigation into Kidd's second complaint consisted of brief phone calls to Kidd. The OSC then determined that none of Kidd's constitutional rights had been violated and that there was insufficient evidence to prove any prohibited personnel practices, including wrongdoing in violation of the merit system principles. It did not find that Kidd's claims lacked merit, but merely that they would be difficult to prove. See: p. A-34.

The OSC did not respond to discovery in this case until ordered to do so by the court. It then asserted that all details of its investigations were privileged and exempt from discovery by the attorney work product and the deliberative process exemptions. It further claimed that discovery of OSC file documents is precluded by the law enforcement evidentiary privilege and the Privacy Act. The OSC argued that if the Kidds needed the information contained in its files, they should reproduce the investigations independently by deposing the same agency officials the OSC had interviewed in conducting its investigations. The Kidd's moved for a continuance of discovery to do so and that motion was ignored by the court.

In an Order dated October 14, 1993, the district court dismissed all of the claims presented in the complaint, except one, for lack of jurisdiction. The court found that the CSRA precludes federal jurisdiction to grant equitable relief based on alleged constitutional violations.

The district court assumed jurisdiction to consider only the narrow issue of whether the OSC had discharged its statutory duty to investigate. By Order dated October 14, 1993, the court granted leave to file an amended complaint and,

in the same Order, granted summary judgement in favor of the government. The court based its decision on an OSC affidavit and the determination that the Kidd's had failed to present facts that would convince the court that the OSC's investigations were inadequate. See: p. A-16.

The case was timely appealed to the Ninth Circuit Court of Appeals, where, by Memorandum filed January 13, 1995, it affirmed. See: p. A-2 at p.11.

REASONS FOR GRANTING A WRIT OF CERTIORARI

I.

A writ of certiorari should be granted because the Ninth Circuit's interpretation of the Civil Service Reform Act - - finding that Kidd's constitutional claims are to be decided with finality by the Office of Special Counsel, an agency of the executive branch - - violates the constitutional fact doctrine and the separation of powers doctrine, long ago established by this Court.

This case alleges that Kidd's constitutional rights were violated first, by the taking of personnel actions against him that constituted prohibited personnel practices, and second, by the agency's willful violation of regulations, mismanagement, and abuse of authority that deprived him of due process, equal protection, and invaded his privacy. Without independently determining the merits of Kidd's constitutional claims, the district court and the 9th Circuit foreclosed any and all judicial review of those claims and deferred, instead, to the provisions of the CSRA which assigns adjudication of constitutional claims to the OSC. See: Orders, p. A-13, & A-19.

The CSRA established an elaborate administrative process interpreted by the courts to be the exclusive remedy

available to federal employees for job related legal actions against their employer. Prior to filing this action, Kidd diligently exhausted all appeals available within that process.

For minor personnel actions, such as those taken against Kidd, the remedy allowed Kidd to file grievances and report the alleged prohibited personnel practices to the OSC. 5 U.S.C. 2302 See: p. A-45.[8] Only the third personnel action taken against Kidd was appealable to the Merit System Protection Board (MSPB). That appeal was available only because Kidd claimed that his 14-day suspension was ordered in reprisal for whistleblowing and only after he had first presented his claims to the OSC for consideration. 5 U.SC. 1221(a); 5 U.S.C. 1214(a)(3). See: pp. A-44, and A-42. In a hearing, the MSPB administrative judge decided only the threshold issue of whether Kidd had blown the whistle. He refused to hear any of Kidd's constitutional claims, finding that for those to properly be before the Board, the OSC must bring them. As a result, none of Kidd's constitutional claims were heard.

It is the "paramount" duty of the OSC to protect employees from prohibited personnel practices. 5 U.S.C. 1212(a)[9] The Special Counsel is to receive allegations, investigate them "to the extent necessary" to determine their merits, and, where appropriate, stay the personnel action or file a complaint before the MSPB to recommend disciplinary actions against the perpetrators. 5 U.S.C. 1212(a)(2); 1214(a)(1)(A); (b)(2)(A), (B), (C). See: pp. A-39, A-41-42.

The sole remedy available to victims of abuse of authority, violation of regulations, and mismanagement, as Kidd was, is to report such violations to the OSC. 5 U.S.C.1213(a). See: p. A-40. Again, it is the responsibility of

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[8] Relevant portions of the CSRA are reprinted in the Appendix and referenced in this brief by page numbers with the prefix A.

[9] See also: Whistleblower Protection Act of 1989, Public Law No. 101-12, 103 Stat 16 (codified as amended in scattered sections of 5 U.S.C.), Section 2.(b)(2)(C), p. A-38.

the OSC to determine the facts and merits of the claims and proceed where appropriate. 5 U.S.C. 1213(b),(c); 5 U.S.C. 1216(a)(3), (4); (c)(1) & (2). See: pp. A-40, A-43.

Noting that the CSRA calls for the protection of federal employees' constitutional rights, the district court in this case foreclosed all judicial review of Kidd's constitutional claims and deferred final adjudication of those claims to the OSC, an agency of the executive branch. See: pp. A-23, A-26. The court did so without independently determining the merits of Kidd's claims. Instead the court argued that to allow federal jurisdiction would "open the back door to judicial review of perhaps an overwhelming number of CSRA claims," that would cost too much and crowd the courts. See: pp. A-24., A-25. The court disposed of Kidd's constitutional claims stemming from official wrongdoing by referring to the alleged violations of law as "irregularities" and then deferring to the OSC's judgement. See: p. A-26.

The 9th Circuit's decision in this case violates the separation of powers doctrine, the constitutional fact doctrine, and effectively places the provisions of the CSRA above the authority of U.S. Constitution.

Constitutional law and precedent dictate that Congress cannot assign original jurisdiction or final adjudication of federal employees' constitutional claims to the OSC without violating the separation of powers doctrine and the constitutional fact doctrine. The separation of powers doctrine, as set forth in the United States Constitution, establishes three branches of government and grants each specific powers. Under the constitution, one branch is not permitted to encroach on the domain of another.

In *Crowell v. Bensen*, 285 US 22, 50 (1932), the Supreme Court held that the separation of powers doctrine is violated when Congress assigns the business of Article III courts to legislative courts for final determination. The Court conceded that ordinary historical facts could be determined by an administrative agency but that an Article III court must independently judge the constitutional facts. *Crowell* 285 US at 57. That is, Congress cannot replace an Article III court with an administrative agency "for the final determination of the

existence of facts upon which the enforcement of the constitutional rights of the citizen depend." *Crowell* 285 at 56.

The district court chose to ignore these arguments and, in so doing, surreptitiously overturned precedent. Upon appeal, the Ninth Circuit completely disregarded the constitutional nature of Kidd's claims and argued that, under *Crowell*, Congress may establish processes such as those established in the CSRA to determine matters which "from their nature do not require judicial review." See: p. A-7. But the *Crowell* court specifically held that "In cases brought to enforce constitutional rights, federal judicial power extends to independently determination of all questions necessary to enforce such rights." *Crowell*, 285 U.S. at 286, No. 11. By their nature, Kidd's constitutional claims require judicial review and the 9th Circuit's analysis, therefore, conflicts directly with this Supreme Court precedent.

Furthermore, without first determining the constitutionality of the CSRA, the court upheld its provisions and effectively placed that Act above substantive judicial review and rendered the actions of executive branch employees outside the reach of the constitution. That, too, violates precedent set by this Court:

> "The powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction between a government with limited and unlimited powers is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed, are of equal obligation. It is a proposition too plain to be contested, that the constitution controls any legislative act repugnant to it; or that the legislature may alter the constitution by an ordinary act.
>
> "Between these alternatives there is no middle ground. The constitution is either a superior paramount law, unchangeable by ordinary means, or it is on a level

with ordinary legislative acts, and, like other acts, is alterable when the legislature shall please to alter it.

"If the former part of the alternative be true, then a legislative act contrary to the constitution is not law: if the latter part be true, then written constitutions are absurd attempts, on the part of the people, to limit a power in its own nature illimitable." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 2 L.ed 60 (1803).

Lastly, The Ninth Circuit found in this case that it lacked jurisdiction to grant declaratory relief under the Declaratory Judgement Act, 28 U.S.C. 2201, because that Act does not grant federal jurisdiction, it merely makes available an additional remedy in cases where a court already has subject matter jurisdiction. Under 28 U.S.C. 1331, federal courts do have subject matter jurisdiction of cases involving individual constitutional claims, including the instant case, and declaratory relief under 28 U.S.C. 2201 can, therefore, be granted.

II.

The district court's determination in this case that the CSRA precludes equitable relief for alleged constitutional violations directly conflicts with cases decided in the Federal Circuit and gives undue deference to cases decided in other circuits.

The Federal Circuit vis-a-vis the CSRA requires special consideration.

"Congress intended the CSRA to be the exclusive remedy for federal employees and the Court of Appeals for the Federal Circuit to be the sole forum for judicial review." *Pinar v. Dole*, 747 F.2d 899 (1984) at 913. Consequently, the Federal Circuit has, undoubtedly, adjudicated the bulk of all cases involving federal employees since the CSRA was passed in 1978.

It would also appear that other circuits have primarily seen cases sounding in constitutional tort -- *Bivens* cases[10] -- where the federal employee sought money damages for alleged constitutional violations,[11] or cases involving federal employees who were exempted from the CSRA or who had failed to exhaust the remedy the Act provides.[12] There is also evidence the other circuits find the CSRA's provisions cumbersome and that they dislike having to hear cases involving that law. In *Broadway V. Block*, 694 F.2d 979 (1982), at 981, the Fifth Circuit stated: "We reluctantly explore its baroque provisions, scattered through Title V of the United States Code, in search of a cause of action." And some decisions from the other circuits also appear to be perfunctory. The constitutional claims presented in *Stephens v. Department of Health and Human Serv.* 901 F.2d 1571 (11th Cir, 1980) are dismissed in one paragraph, half of which is citings, with the brief statement that the "arguments based on alleged deprivations of constitutional rights also cannot carry the day." *Stephens* 901 F.2d at 1576.

Over the years, the Federal Circuit has unarguably become the expert on the CSRA. Its decisions contain extensive analysis of specific aspects of the law and detailed explanations of its findings. Being the designated Circuit to

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[10] See: *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 91 S.Ct. 1999 (1971).

[11] See: *Broadway v. Block*, 694 F.2d 979 (5th Cir. 1982); *Braun v. U.S.*, 707 F.2d 922, (6th Cir. 1983); *Pinar v. Dole*, 747 F.2d 899 (4th Cir. 1984); and *Lombardi v. SBA*, 899 F.2d 954 (10 Cir. 1989).

[12] See: *Broadway v. Block*, 694 F.2d 979 (5th Cir. 1982); *Pinar v. Dole*, 747 F.2d 899 (4th Cir. 1984); and *Stephens v. Dept of Health & Human Services*, 901 F.2d 1571 (11th Cir. 1990).

hear appeals of federal employment cases, it decides issues of first impression that initially interpret the CSRA: it sets the precedent.

The Federal Circuit has also developed a clear appreciation of how the CSRA's remedial scheme works and how it does not work. That knowledge has shaped its decisions. For example, upon rehearing of the *Borrell* case, the court reversed itself after considering a letter from the OSC. The court quotes the letter in applicable part:

> "The Civil Service Reform Act of 1978 does not require Federal employees to submit a complaint or allegations to this Office. Whether the Special Counsel seeks a stay of a personnel action before the Merit System Protection Board is purely discretionary with the Special Counsel, and in any event the employee is not a party to the proceedings. The nature of the inquiry and investigation conducted by the Special Counsel upon receipt of a complaint is also discretionary. Additionally, an employee does not have any appeal rights to the Merit Systems Protection Board, from a decision or determination made by the Office of the Special Counsel. Nor is there any provision for judicial review of the Special counsel determination.
>
> It should be further noted that if the Special Counsel files a request for an order of corrective action with the Merit System Protection Board pursuant to 5 U.S.C., 1206(C)(1)(B), the affected employee is not a party unless the Board permits him to intervene."
>
> *Borrell v. U.S. Intern. Comm. Agency*, 682 F.2d 981 (D.C. Cir. 1982) at 984-85.

The *Borrell* court then stated:

> "We would, further, be hard pressed to deny jurisdiction over a constitutional claim when the only alternative statutory remedy allows no right

> of individual participation by the injured employee and permits no judicial review of the merits of the agency official's decision not to investigate or prosecute the employee's claim." *Borrell* 682 F.2d at 990.

In deciding the instant case, the district court noted that only one circuit, the Federal Circuit, has held that the CSRA does not preclude equitable relief based on constitutional claims: it further noted that five other circuits have held the opposite. Citing one case from each circuit that has decided the issue, the court then based its decision on the "weight of authority from the other circuits", presumably "weighing" the 5 to 1 ratio.

The one case cited from the Federal Circuit, *Spagnola v. Mathis*, 859 F.2d 223, (D.C. Cir. 1988) is the last in a line of cases in which the D.C. Circuit has consistently held that cases involving the constitutional rights of federal employees are appealable to the federal courts under the CSRA. The *Spagnola* court stated:

> "We do not suggest that the CSRA precludes the exercise of federal jurisdiction over the constitutional claims of federal employees and job applicants altogether. ... On the contrary, time and again this court has affirmed the right of civil servants to seek equitable relief against their supervisors, and the agency itself, in vindication of their constitutional rights. See, e.g.: *Hubbard v. U.S. EPA, Admin.*, 809 F.2d 1, (D.C. Cir. 1986); *Williams v. IRS*, 745 F.2d 702, 705 (D.C. Cir. 1984); *Cutts v. Fowler*, 692 F.2d 138, 140-41 (D.C. Cir. 1982); *Borrell v. United States Int'l Comm. Agency*, 682 F.2d 981,989-90 (D.C. Cir. 1982).

Spagnola, 859 F.2d at 229-230. And in *Hubbard* the Federal Circuit specifically held that the "Civil Service Reform Act

does not preclude federal employees from seeking equitable relief against agencies for allegedly unconstitutional personnel actions." *Hubbard* 809 F.2d at 981.

We argue that because of the Federal Circuit's greater knowledge, expertise, and experience in this area of the law, more deference should be given to the cases decided in that Circuit. And because the court's decision in the instant case directly conflicts with the decisions reached in all of the Federal Circuit cases, cert should be granted to resolve the conflict.

III.

By deferring Kidd's constitutional claims to the OSC, the district court decidedly conferred final jurisdiction of those claims to an agency within the executive branch of government. Whether the CSRA transfers such jurisdiction is a question only the Court should decide.

Under federal law 28 U.S.C.1331, the federal court alone has original jurisdiction of all cases arising under the constitution. And that jurisdiction has long been recognized in legal precedent:

> "The constitution vests the whole judicial power of the United States in one Supreme Court, and such inferior courts as congress shall, from time to time, ordain and establish. This power is expressly extended to all cases arising under the laws of the United States."

Marbury v. Madison, 5 U.S. (1 Cranch) 137, 2 L.Ed 60 (1803).

In the instant case, the district court dismissed all of Kidd's constitutional claims in deference to the OSC. See: p. A-26. Upon appeal, the Ninth Circuit found that the district court correctly determined that it did not have jurisdiction of Kidd's constitutional claims and that it saw no reason to "second guess" the OSC. See: pp. A-6., A-10.

Citing Wren v. MSPB, 681 F.2d 687 (1982), the district court accepted jurisdiction to considered only one issue: whether the OSC discharged its statutory duty to investigate Kidd's complaints. See: p. A-22. The CSRA requires that the OSC investigate allegations of prohibited personnel practices to the extent necessary to determine whether there are reasonable grounds to believe that a prohibited personnel practice has occurred, exists, or is to be taken. 5 U.S.C. 1214(a)(1)(A). See: p. A-41. The Act also requires the OSC to investigate activities prohibited by any civil service law, rule, or regulation including any activities related to political intrusion in personnel decisionmaking. 5 U.S. C. 1216(a)(4) See: p. A-44. It also provides that upon receipt of allegations of such activities, the OSC may investigate in the same way as if a prohibited personnel practice were involved. 5 U.S.C. 1216(c)(2). See: p. A-44.

In an effort to establish that the OSC's investigations were inadequate, the Kidds supplied documented evidence that demonstrated that prohibited personnel practices had occurred and that the officials had clearly violated federal regulation.[13]

The Kidds also attempted to discover precisely what information the OSC had relied on in making its determinations. However, in discovery, the court sustained the OSC's assertion that all of the factual information developed through its investigations was exempt form discovery. The court then granted summary judgement in favor of the OSC because the Kidds "did not set forth facts that convince the

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[13] For example, the Kidds supplied grievance documents that showed that, when Kidd elevated his amended grievance to the Secretary of the Interior, the Secretary's personnel office remanded it back to the Commissioner's office and that office, in turn, assigned the very individual who had ordered the personnel action being grieved to serve as the deciding official. The Kidds also supplied copies of the regulations these actions violated. They also supplied documents that showed that Kidd had reported this and other official wrongdoing to the Secretary and to Congress and that he was suspended, in part, for having done so.

court that the extent of the investigations undertaken was insufficient" to determine the merits of Kidd's claims. See p. A-16. And summary judgement was granted on the basis of an OSC affidavit that simply defined the law and asserted that the law was followed. See p. A-28.

Such legal reasoning contorts the law and condones justice by affidavit. The court cannot determine the extent and adequacy of the OSC's investigations if it does not examine the substance of the evidence developed during the investigations. Moreover, the scenario set forth by the OSC in defeat of Kidd's allegations was constructed on information supplied by the agency -- indeed, the very personnel office -- accused of the wrongdoing. If, through discovery, Kidd is not permitted to depose witnesses and examine documents to establish the truth, he is deprived of his fundamental right to develop his case and defend his rights.

This case alleges that the OSC failed to meet its duty to investigate "to the extent necessary" to determine the merits of Kidd's allegations. In Wren, the court held that if the OSC fails to perform its statutory duties, relief, 'if at all' must be sought in a separate action in district court to compel the OSC to perform its statutory duties. Wren 681 f.2d at 872, citing Cf. Dunlop v. Bachowski, 421 U.S. 560, (1975) (5 U.S.C. §§ 702 and 704.)

The district court in the instant case foreclosed that possibility by refusing jurisdiction under 5 U.S.C. 702-706. See: p. A-. Furthermore, unlike Wren, the instant case involves constitutional claims, the jurisdiction of which the district court has not conferred to the OSC.

Whether the CSRA can and should confer such jurisdiction is an important question of federal law that only this Court should decide. This writ of certiorari should, therefore, be granted.

CONCLUSION

There is much more to this case than a stalwart attempt to salvage the professional reputation of one federal employee. The CSRA established a comprehensive remedial scheme to provide the people of the United States with a competent, honest, and productive federal work force. That scheme depends on the integrity of the officials in charge. If there is no integrity then the scheme fails. And if supervisors within the executive branch are free to act with impunity, then the federal employee has no constitutional rights on the job. And the CSRA is nothing but a cruel hoax. Especially when federal employees, under Executive Order 12674 of April, 1989, are required to disclose official wrongdoing.

On behalf of all civil servants, we respectfully request that this petition for certiorari be granted.

APPENDIX

FILED
MAR 29 1995
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DEL KIDD; JUDY KIDD,	)
Plaintiffs - Appellants,	) No. 93-17336
V.	) D.C. No.
	) CV-92-00583-LDG(R
UNITED STATES OF AMERICA,	)
Defendant - Appellee.	) ORDER
	)

Before: POOL and NOONAN, Circuit Judges, and MARQUEZ*, District Judge.

The panel has voted to deny appellants' petition for rehearing. Judges Pool and Noonan vote to reject the suggestion for rehearing en banc, and Judge Marquez so recommends.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

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* Honorable Alfredo C. Marquez, United States District Judge, District of Arizona, sitting by designation.

FILED
Jan 13 1995
Cathy A. Catterson, Clerk
U.S. Court of Appeals

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DEL KIDD; JUDY KIDD,	)	
	)	
Plaintiffs - Appellants,	)	No. 93-17336
	)	
v.	)	D.C. No.
	)	CV-92-00583-Ldg(R
UNITED STATES OF AMERICA,	)	
	)	MEMORANDUM*
Defendant - Appellee.	)	
	)	

Appeal from the United States District Court
for the District of Nevada
Lloyd D. George, District Judge, Presiding

Submitted September 12, 1994**
San Francisco, California

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. r. 36-3.

** Pursuant to Ninth Circuit Rule 34-4, the panel unanimously finds this case suitable for disposition without oral argument.

Before: POOLE and NOONAN, Circuit Judges, and MARQUEZ***, District Judge.

In this appeal Del and Judy Kidd, Appearing pro se, seek judicial review of the federal civil service grievance process. The Kidds claim that the grievance process for alleged prohibited personnel practices at the Bureau of Reclamation has denied Del Kidd of his constitutional rights to due process, equal protection, privacy, freedom of speech, and freedom of assembly. We affirm the district court's disposition of this case.

I.

The parties are aware of the facts and previous proceedings in this case so we do not repeat them here.

II.

We review dismissals for lack of subject matter jurisdiction and dismissals for failure to state a claim upon which relief can be granted de novo. Kruso v. International Tel. & Tel. Corp., 872 F.2d 1416, 1421 (9th Cir. 1989), cert. denied, --- U.S. ---, 110 S. Ct. 3217 (1990).

We review a district court's entry of summary judgement de novo. White v. Atlantic Richfield Co., 945 F.2d 1130, 1132 (9th Cir. 1991). Viewing the evidence in the light most favorable to the nonmoving party, we must determine whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law. Id.; Fed. R. Civ. P. 56(c).

Nevertheless, the nonmoving party must set forth

*** Honorable Alfredo C. Marquez, United States District Judge, District of Arizona, sitting by designation.

specific facts showing that there is a genuine issue for trial and "may not rest upon mere allegations in the pleadings in order to preclude summary judgement." T.W. Elec. Serv. v. Pacific Elec. Contractors Ass'n, 809 F.2d 626, 629-30 (9th Cir 1987). Moreover, there is no genuine issue of material fact if the nonmoving party "fail[s] to make sufficient showing on an essential element of her case with respect to which she has the burden of proof." Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986).

III.

The district court held that the Administrative Procedures Act (APA) did not provide a basis for jurisdiction over the OSC's decision to not peruse their claims of prohibited personnel practices. The Kidds argue for APA review because there is a presumption that Congress intended judicial review of agency actions (Taylor v. Turnage, 485 U.S. 535, 542 1988), and the Civil Service Reform Act (CSRA) says nothing which explicitly preempts the APA.

The Kidds, however, have failed to distinguish our prior holding that review of administrative personnel actions pursuant to the APA is improper. Veit v. Heckler, 746 F.2d 508, 511 (9th cir. 1984) specifically held that APA review of CSRA grievances was improper because "the comprehensive nature of the procedures and remedies provided by the CSRA indicates a clear congressional intent to permit federal court review as provided in the CSRA or not at all." In light of Veit, we affirm the district court's refusal to accept jurisdiction pursuant to the APA.

IV.

The district court held that it had no jurisdiction to hear the Kidds' claims stemming from the Merit System Protection Board's (MSPB"s) denial of Del Kidd's "whistleblower" action.

The Federal Circuit has exclusive jurisdiction over final decisions of the MSPB. 5 U.S.C. § 7703 (b)(1). Kidd has appealed the MSPB's decision to the Federal Circuit.

The district court appropriately determined that the only basis for the Kidds' first amendment claims is Del Kidd's alleged whistleblowing. The Federal Circuit has exclusive jurisdiction to review those claims. To the extent that due process was denied by the MSPB's denial of his whistleblower action, the Kidds have recourse to the Federal Circuit. If they are not satisfied with the Federal Circuit's resolution of these alleged constitutional deficiencies they may petition the Supreme Court for certiorari. Accordingly, we affirm the district court's decision to not review the MSPB's decision.

V.

The Kidds ask for declaratory relief. Federal Rule of Civil Procedure 57 states that the existence of another adequate remedy, such as the CSRA process, "does not preclude a judgement for declaratory relief in cases where it is appropriate." But the Declaratory Judgement Act, 28 U.S.C. § 2201, is not a grant of jurisdiction to the federal courts. It merely makes available an additional remedy in cases where a court already has subject matter jurisdiction. Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667, 671-72 (1950). The Kidds' plea for declaratory relief cannot be read to imply jurisdiction.

VI.

The Kidds ask for injunctive relief. In Saul v. United States, 928 F.2d 829 (9th Cir. 1991), we stated that '[t]he CSRA's elaborate remedies show that judicial interference in federal employment is disfavored, whether the employee requests damages or injunctive relief. . . . The CSRA precludes [a plaintiff] from seeking injunctive relief for his

asserted constitutional injury just as it precludes him from bringing a Bivens action for damages." We have previously held, pursuant to Saul, that the Kidds' claim for a Bivens action in this case is precluded by the CSRA. Kidd v. United States, 92-15657, memorandum disposition (9th Cir. Oct. 7, 1993.)

Saul, following the majority of circuits that have addressed the issue[1], clearly indicates that the CSRA precludes injunctive relief in CSRA cases. Accordingly, the district court correctly determined that it did not have jurisdiction to provide injunctive relief in regard to the remaining constitutional issues of privacy, equal protection, and due process.

VII.

The Kidds argue that the central claim of this case if "that the court should review the remedial scheme established under the CSRA to determine if it adequately protects the constitutional rights of federal employees like Kidd." Kidd relies on Crowell v. Benson, 285 U.S. 22 (1932) for the proposition that the federal courts must review the constitutionality of the CSRA because it presents a federal constitutional issue. Crowell, however, carefully distinguishes between federal court power in cases affecting private rights and cases affecting public rights (public rights being defined as rights arising "between the government and persons subject to

---

[1] See, e.g. Stephens v. Dept. of Health and Human Serv., 901 F.2d 1571, 1576 (11th Cir. 1990); Lombardi v. Small Business Admin., 889 F.2d 959, 961 (10 Cir. 1989); Pinar v. Dole, 747 F.2d 899, 912 (4th Cir. 1984), cert denied 471 U.S. 1016 (1985); Braun v. United States, 707 F.2d 922, 926-27 (6th Cir.), cert. denied sub nom., Hardich v. United States, 464 U.S. 991 (1983); Broadway v. Block, 694 F.2d 979, 986 (5th Cir. 1982).

its authority in connection with the performance of the constitutional functions of the executive or legislative departments"). 285 U.S. at 50. According to Crowell, with regard to issues such as public employment, Congress may establish dispute resolution processes such as those established in the CSRA

> 'to examine and determine various matters, arising between the government and others, which from their nature do not require judicial determination and yet are susceptible of it.' But 'the mode of determining matters of this class is completely within congressional control. Congress may reserve to itself the power to decide, may delegate that power to executive officers, or may commit it to judicial tribunals.' Ex parte Bakelite Corporation, 279 U.S. 438, 451.

Id. at 50-51. The Kidd's have also failed to recognize that sovereign immunity, in and of itself, provides a severe limit on federal court jurisdiction. See Cary v. Curtis, 44 U.S. (3 How.) 235, 244-45 (1845).

VIII.

The district court acknowledged that it had limited jurisdiction to review the OSC's investigation. We have previously noted that judicial review of the OSC is "limited, at most, to insuring compliance with the statutory requirement that the OSC performed an adequate inquiry." Veit v. Heckler, 746 F.2d 508, 510-11 (9th Cir. 1984) (quoting Carducci v. Regan, 741 F.2d 171, 175 (D.C. Cir. 1983). Kidd argues that the district court improperly granted summary judgement on this issue, in part because the court relied upon the affidavit of Mr. Leonard M. Dribinsky, which had been challenged by the Kidds' motion to strike as irrelevant, self-serving hearsay. The

Kidds also complained that they were denied necessary discovery that rendered summary judgement premature.

The district court's order of October 15, 1993 (CR 41) did not explicitly address the Kidds' Motion to Strike the Affidavit of Dribinsky, or their Motion for a Continuance to Complete Discovery, although both motions were made in the Kidds' August 10, 1993 Response to the Government's Motion to Dismiss (CR 35). The district court's order, however, disposes of CR 35, and implicitly denies both motions.

A.

Leonard M. Dribinsky was the Deputy Associate Special Counsel for Prosecution of the OSC. As the government official charged with deciding whether to pursue complaints, he decided not to pursue the Kidds' complaint, and sent official notification that no further action was being taken on their complaints. Dribinsky's affidavit about what steps OSC followed in reviewing both of the Kidds' complaints goes to the very heart of what the district court decided on summary judgement. It is not irrelevant. It is based on personal knowledge of what happened with the Kidds' complaints. It is not hearsay. The fact that Dribinsky might have a vested interest in the outcome does not provide a legal basis for striking the affidavit. The district court's implicit denial of the Kidds' motion to strike was proper.

B.

We review a district court's refusal to permit further discovery pursuant to Federal Rule of Civil Procedure 56(f) for abuse of discretion. Harris v. Duty Free Shoppers Ltd. Partnership, 940 F.2d 1272, 1276 (9th Cir. 1991). The Kidds contend that the information needed to address the adequacy of the OSC's investigation remains in the sole possession of the OSC, or with individuals who have not yet been deposed.

Congress has given OSC authority to systematically screen out unmeritorious employee complaints. Wren v. Merit Systems Protection Bd., 681 F.2d 867, 875 n. 9 (D.C. Cir. 1982). The D.C. Circuit, however, in providing independent judicial review of the adequacy of OSC investigations reasoned "we cannot so easily conclude that Congress meant to provide no means to enforce the OSC's failure to perform a ministerial duty, i.e., to investigate or to screen to some extent employee complaints which allege prohibited personnel practices." Id. (emphases added). In Wren the petitioner had sought an OSC investigation in March 1979. She never heard anything about her complaint until she contacted the OSC again, more than a year later, and was subsequently informed that her case had been closed a year earlier without being reviewed on the merits. 681 F.2d 870-71.

The Wren court was clearly critical of the OSC's failure to perform minimal ministerial functions. Nonetheless, by granting some type of judicial review of OSC determinations, the D.C. Circuit did not indicate that courts should engage in more substantive review than that required by our general administrative laws. In other words, nothing in Wren or its progeny suggests to us that courts should review more than whether the agency's action was arbitrary, capricious, an abuse of discretion, not in accordance with law, or taken without observance of procedure required by law. Compare 5 U.S.C. § 706 (2)(A) (APA standard of review).

The law requires OSC to investigate allegations of prohibited personnel practices "to the extent necessary to determine whether there are reasonable grounds to believe that a prohibited personnel practice has occurred, exists, or is to be taken." 5 U.S.C. § 1214(a)(1)(A). When it ends its investigation, the OSC is required to prepare and transmit to the complainant a written statement that notifies the person that the investigation has ended, provides a summary of the relevant

facts that support and do not support the allegations, and provides the reasons for ending the investigation. 5 U.S.C. §§ 1214(a)(2)(i), (a)(2)(A)(ii) and (a)(2)(A)(iii).

Inasmuch as the caselaw only provides for a highly deferential review of OSC investigations the district court did not abuse its discretion when it ended discovery once it was in possession of the closure letters, the Dribinsky affidavit, and the other materials related to OSC's statutory ministerial duties. We affirm the district court's October 15, 1993 order as a valid denial of the Kidds' request for a continuance of discovery.

C.

The disputed material facts before the court, then, were that the examiners had reviewed the complaints and supporting material, and contacted the plaintiffs. Recommendations and summaries had been reviewed by the chief complaints examiner and Mr. Dribinsky. Dribinsky personally prepared two closure letters sent to the Plaintiffs informing them of the decision not to pursue investigation and summarizing the relevant facts and reasons for his decision. Although the Kidds dispute one account of witness contact, nothing in the statute indicates that witnesses must be contacted in order for the OSC to fulfill its ministerial functions.

The Kidds themselves have acknowledged that "technically, the process was followed." CR 35 at 8. The Kidds complain that there should have been more extensive investigation, that the closure letters should have been more detailed. The district court, however, concluded that the OSC made a reasonable investigation into the allegations. The district court also noted that the closure letters were only required to summarize relevant facts, and that the letters complied with the statutory requirements.

We agree. We see no reason to second guess the OSC's determinations where the undisputed facts indicate that it

has met its ministerial statutory responsibilities. We therefore affirm the district court's grant of summary judgement to the Untied states on this issue.

IX.

For the following reasons, the judgement of the district court is AFFIRMED.

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OCT. 18, 199
CLERK, U.S. DISTRICT COURT
DISTRICT OF NEVADA
BY: P. JOHNSON, DEPUTY

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AND FILED
OCT. 13 3:00 PM '93
CAROL C. FITZGERALD
CLERK
DEPUTY

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

DEL AND JUDY KIDD,	)
	)
Plaintiff,	)
	)
v.	) CV-S-92-583-LDG
	) (RLH)
UNITED STATES OF AMERICA,	)
	)
Defendant.	)
	)

JUDGEMENT

IT IS HEREBY ORDERED that judgement is rendered in favor of the Defendant United States of America and against the Plaintiffs Del and Judy Kidd pursuant to this court's Order granting summary judgement on the Amended Complaint.

DATE: 14 Oct. 1993

L.D. George
LLOYD D. GEORGE
Chief United States District Judge

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DISTRICT OF NEVADA
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BY: P. JOHNSON
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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

DEL AND JUDY KIDD,)
)
Plaintiff,)
)
v.)CV-S-92-583-LDG(RLH)
)
UNITED STATES OF AMERICA,)
)
Defendant.)
_____)

ORDER

This matter is before the court on the following motions: Defendant's Motion to Dismiss or In the Alternative, for Summary Judgement (#31), Opposition (#35), Reply (#37);

Plaintiff's Motion for Leave to File Amended Complaint (#30); Opposition (#32);

Defendant's Motion to Strike Amended Complaint or, In the Alternative, Motion to Dismiss or Motion for Summary Judgement and Motion for Injunctive Relief (#32), no response.

BLE COPY

I. Motion for Leave to File Amended Complaint (#30)

Plaintiffs seek leave to file an amended complaint. Prior to the filing of this motion the court narrowed the complaint by identifying the only remaining issue which the court could review. The amendments which Plaintiffs seek to include are more specifically addressed to that issue. Rule 15(a) of the Federal Rules of Civil Procedure states that a party may amend its pleading once as a matter of course prior to the filing of a responsive pleading. As no Answer has yet been filed, the amended pleading will be filed.

II. Motion to Dismiss or for Summary Judgement (#31)

This motion was filed prior to Plaintiffs' Amended Complaint and does not address the additional information contained in that pleading. Because the court has allowed amendment of the complaint, this motion is essentially moot and will be denied.

III. Motion for Summary Judgment(#32)

Under Rule 56(c) of the Federal Rules of Civil Procedure, summary judgement is only proper when the pleadings, discovery and affidavits show that there is "no genuine issue of material fact and that the moving party is entitled to judgement as a matter of law." F.R.Civ.P.56(c). The party opposing summary judgement must demonstrate that the fact in contention is material, and that a reasonable jury could return a verdict for the nonmoving party. Lindahl v. Air France, 930 F.2d 1434, 1436-37 (9th Cir. 1991), citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248-49 (1986).

Rule 56(e) states that if the party opposing the motion for summary judgment is the party who must bear the burden

of proof at trial, which Plaintiff is, that party must set forth in its affidavits specific evidence, through affidavits or admissible discovery material, to show that genuine issues of fact exist. F.R.Civ.P 56(e). If the party fails to do so, summary judgment is proper. Bhan, 929 F.2d at 1409.

In this matter, the court dismissed all but one of Plaintiffs' claims and narrowed the remaining claim to the question of whether the OSC had properly discharged its duty to investigate. See Towers v. Horner, 791 F.2d 1244, 1246 n.14. (5th Cir. 1986), citing Wren v. Merit Systems Protection Board, 681 F.2d 867, 875 n.9 (D.C. Cir. 1982) (judicial review limited to determination of whether OSC properly investigated employee charges). See also Carducci v. Regan, 714 F.2d 171, 175 (D.C. Circuit 1983) (same).

The court has allowed Plaintiffs to file an amended complaint which Plaintiffs state addresses this issue more completely. Defendant's motion addresses the amended complaint and states that it should be stricken, dismissed or that summary judgement is proper. The court finds that the evidence presented by both parties makes a summary judgement finding appropriate at this time.

The OSC is statutorily required to investigate allegations of prohibited personnel practices "to the extent necessary to determine whether there are reasonable grounds to believe that a prohibited personnel practice has occurred, exists, or is to be taken." 5 U.S.C. § 1214(a)(1)(A). Once it terminates an investigation, the OSC is required to prepare and transmit to the complainant a written statement notifying the person of: (1) the termination of the investigation; (2) a summary of the relevant facts that support and do not support the allegations; and (3) the reasons for terminating the investigation. 5 U.S.C. §§ 1214(a)(2)(A)(i), (a)(2)(A)(ii) and (a)(2)(A)(iii).

In this matter, there are two complaints and investigations at issue. The individual responsible for verifying

and evaluating the investigations of Plaintiffs' complaint, Leonard Dribinsky, has provided affidavits establishing that Plaintiffs and other witnesses were contacted by telephone by experienced complaint examiners. These examiners then prepared summary and recommendations which were reviewed by the Chief complaints examiner and Mr. Dribinsky himself. Mr. Dribinsky personally prepared the two closure letters sent to Plaintiffs by the OSC informing them of their decision not to pursue the investigations further.

Plaintiffs argue that the investigation was statutorily inadequate because the OSC failed to sufficiently set forth in its closure letters the facts which did not support their allegations. Plaintiffs also argue that Defendant has failed to establish that the investigations were sufficiently extensive to reasonably determine whether there are reasonable grounds to believe that a prohibited personnel practice has occurred. The court's review of the closure letters and the affidavits leads it to a different conclusion.

That statutory language does not require the OSC to set forth all of the facts which led to the decision to terminate the investigation. What the statute requires is that the OSC make reasonable inquiry and then summarize the relevant facts which support or do not support the allegations. The Dribinsky affidavit indicates that he has personal knowledge that Plaintiffs and another witness were contacted by telephone by the complaint examiners on the separate complaints, and that the examiners reviewed the allegations and supporting documentation submitted by Plaintiffs in preparing their summaries.

Although Plaintiffs argue that the OSC could have conducted a more extensive investigation into their allegations, they do not set forth facts that convince the court that the extent of the investigations undertaken was insufficient to determine whether there were reasonable grounds to believe that

prohibited personnel practices had occurred. There is ample evidence that the OSC made a reasonable investigation into the allegations.

As to the requirements of section 1214(a)(2)(A) regarding the contents of the closure letters, these letters do set forth facts which do not support the allegations. The July 17, 1989 letter informs Plaintiffs that the fact that the agency had discussed reassignment prior to the filing of the first grievance and that there was a strained working relationship in that office was sufficient to indicate that the reassignment was not an act of reprisal but rather a means of more effectively addressing the conflict of personalities that existed. These relevant facts are sufficient to comply with the requirements of the statute.

The closure letter of January 2, 1991 also set forth facts and legal conclusions sufficient to comply with the statutory requirements. The letter addressed the facts alleged by Plaintiffs and explained why the OSC felt that these facts did not constitute prohibited personnel practices. Although the letter does not detail every fact in support or in contravention of the allegations, it sets forth relevant facts and reasonable conclusions therefrom. From its interpretation of the statute, the court does not find that the statute requires more.

Therefore, the court finds that Defendant has met its burden to show that the OSC complied with its statutory duty to investigate Plaintiffs' allegations. Plaintiffs have not set forth sufficient facts to convince the court that genuine issues of material fact exist on this issue. Thus, the court finds that summary judgment is proper.

IV. Motion for Injunctive Relief (#32)

Defendant requests that the court enjoin Plaintiffs from filing further complaints in this court. Although the court notes that the Plaintiffs have brought several actions in this court, it does not appear to the court that Plaintiffs have set out to abuse

the litigation process. Plaintiffs have complained of several incidents occurring over a space of a few years. Thus, it does not appear that filing separate actions in this matter was abusive.

However, the court would stress that once a matter has been litigated in this court, it is an abuse to attempt to raise those identical matters in a subsequent suit. Therefore, if Plaintiffs file additional complaints in this court seeking relief on the issues previously determined, the court will consider the option of imposing injunctive relief. However, the court is confident that Plaintiffs will respect the decisions of this court and the court of appeals in determining their entitlement to relief on their claims.

Accordingly, good cause appearing,

IT IS HEREBY ORDERED that Defendant's Motion to Dismiss or In the Alternative, for Summary Judgement (#31) is denied as moot.

IT IS FURTHER ORDERED that Plaintiff's Motion for Leave to File Amended Complaint (#30) is granted.

IT IS FURTHER ORDERED that Defendant's Motion to Strike Amended Complaint or, In the Alternative, Motion to Dismiss or Motion for Summary Judgment and Motion for Injunctive Relief (#32) is granted.

IT IS FURTHER ORDERED that Defendant's Motion for Injunctive Relief (#32) is denied.

DATE: 14 Oct 1993

L D George

LLOYD D. GEORGE
Chief United States District Judge

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CLERK, U.S. DISTRICT COURT
DISTRICT OF NEVADA
BY: P. JOHNSON, DEPUTY

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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

DEL AND JUDY KIDD,

Plaintiffs,

v.

UNITED STATES OF AMERICA,

Defendant.

CV-S-92-583-LDG(RJJ)

ORDER

This matter is before the court on Defendant's Motion to Dismiss with Prejudice (#3). Plaintiffs have Opposed (#4).

Plaintiffs, after exhausting their administrative remedies under the Civil Service Reform Act (CSRA), are now seeking declaratory relief from this court pursuant to 28 U.S.C. § 1331 and the Administrative Procedure Act, 5 U.S.C. §§ 701-706 (APA).

Specifically, Plaintiffs seek the court to review administrative decisions made by Defendants during the course

of the grievance process for alleged violations of due process, equal protection, privacy and freedom of speech and assembly. Plaintiffs also seek a ruling by the court that the grievance procedures provided by the CSRA are constitutionally inadequate. Finally, Plaintiffs request that the court vacate the administrative decisions of the Defendants and strike the adverse results from all government records.

Plaintiffs are in essence asking the court to rule on the validity of the administrative actions taken and the administrative procedures employed in this case. Plaintiffs' reliance on the APA as a basis for jurisdiction is misplaced. It is clear that the CSRA provides a comprehensive scheme for administrative and judicial review of personnel actions and practices concerning federal employees. See Veit v. Heckler, 746 F.2d 508 (9th Cir. 1984). In Veit, the Ninth Circuit held that review of administrative personnel actions or procedures under the general provisions of the APA was improper because "the comprehensive nature of the procedures and remedies provided by the CSRA indicates a clear congressional intent to permit federal court review as provided in the CSRA or not at all." Id. at 511 (citation omitted). See also Stephens v. Department of Health and Human Services, 901 F.2d 1571, 1575-76 (11th Cir.), cert. denied 111 S.Ct. 555 (1990); Ryon v. O'Neill, 894 F.2d 199, 200 (6th Cir. 1990); Pinar v. Dole, 747 F.2d 899, 912-13 (4th Cir. 1984).

Therefore, unless Plaintiffs establish a right to review by this court under the CSRA, the court may not review the administrative actions or procedures complained of in the suit.

I. Adverse Action - Whistleblower Claim

In their first claim for relief, Plaintiffs allege that they were deprived of due process and their first amendment rights because the Merit System Protection Board improperly denied their whistleblower claim. Upon review of the relevant

sections of the CSRA, the court notes that judicial review of adverse decisions by the Merit System Protection Board (MSPB) is specifically authorized in section 7703 of the CSRA. See 5 U.S.C. § 7703.

> Section 7703(b)(1) states, in pertinent part, that "a petition to review a final order or final decision of the Board shall be filed in the United States Court of Appeals for the Federal Circuit. Notwithstanding any other provision of law, any petition for review must be filed within 30 days after the date the petitioner received notice of the final order or decision of the Board."

5 U.S.C. § 7703(b)(1).

Plaintiffs admit that the whistleblower claim was heard in an MSPB hearing before an administrative judge and was resolved against them. They also acknowledge that they are currently appealing that decision in the Court of Appeals for the Federal District. Under section 7703(b)(1) and the holding in Veit, it is clear that this court has no jurisdiction to hear this claim. As such, it must be dismissed.

II. Prohibited Personnel Practices

Also in their first claim for relief, Plaintiffs claim that the Office of Special Counsel (OSC) failed to properly investigate their allegations of prohibited personnel practices concerning the transfer, administrative leave and 14-day suspension. According to Plaintiffs, the OSC found in their final decision that none of Plaintiffs' constitutional rights had been violated by any of the personnel decisions and refused to submit these issues to the MSPB. Plaintiffs argue that they were denied due process because the investigation was inadequate due to the fact that formal discovery, fact finding and hearings were not conducted.

The CSRA provides that personnel practices violative of the merit system principles constitute 'prohibited personnel practices." 5 U.S.C. § 2302(b)(11). The merit system principles require that employees be treated "with proper regard for their privacy and constitutional rights." 5 U.S.C. § 2301(b)(2). The CSRA provides administrative remedies for alleged prohibited personnel practices by stating that such allegations must be received and investigated by the OSC. 5 U.S.C. § 202(a) [sic, 1212]. When the OSC believes that a prohibited personnel practice has occurred, it may petition the MSPB to stay the action or correct the prohibited practice. Id.

However, the Act does not provide for judicial review of the OSC's decision not to petition the MSPB. See Towers v. Horner, 791 F.2d 1244, 1246 (5th Cir. 1986). Nevertheless, the D.C. Circuit has stated that judicial review of an OSC decision not to pursue a complaint for alleged prohibited personnel practices is available but limited to a finding of whether the OSC discharged its duty to investigate. Id. n.14., citing Wren v. Merit Systems Protection Board, 681 F.2d 867, 875 n.9 (D.C. Cir. 1982). See also Carducci v. Regan, 714 F.2d 171, 175 (D.C. Circuit 1983).

In this matter, Plaintiffs have alleged that an inadequate investigation was conducted by the OSC. Taking these allegations as truthful, as the court must for purposes of a motion to dismiss, review would appear to be proper to determine the limited issue of whether the OSC discharged its statutory duty to investigate. Therefore, dismissal is not warranted on this claim.

III. Constitutional Claims

Plaintiffs argue that their claims for equitable relief are based on constitutional violations and are thus outside the scope of the CSRA. It is clear that a Bivens action for alleged constitutional tort violations is not available in light of the CSRA's comprehensive remedial procedures. Saul v. United

States, 928 F.2d 829, 840 (9th Cir. 1991). It also seems clear that prohibited personnel actions include violations of employee's constitutional rights. See e.g., Saul, 924 F.2d at 838 n.16.

However, it is not clear whether the comprehensive nature of the CSRA precludes a district court from granting injunctive or equitable relief for alleged constitutional violations. The District of Columbia Circuit espouses the position that the CSRA does not preclude equitable relief. See Spagnola v. Mathis, 859 F.2d 223, 229-30 (D.C. Cir. 1988) (en banc). Nevertheless, other circuits have ruled that such review is precluded. See Stephens v. Dept. of Health and Human Services, 901 F.2d 1571, 1576 (llth Cir. 1990); Lombardi v. SBA, 889 F.2d 959, 961-61 (10th Cir. 1989); Pinar v. Dole, 747 F.2d 899, 912 (4th Cir. 1984), cert. denied 471 U.S. 1016 (1985); Braun v. United States, 707 F.2d 922, 926-27 (6th Cir.), cert. denied sub nom., Hardrich v. United States, 464 U.S. 991 (1983); Broadway v. Block, 694 F.2d 979, 986 (5th Cir. 1982).

The Ninth Circuit does not appear to have ruled on this issue. See Peterman v. United States, 927 F.2d 610 (9th Cir. 1991) (unpublished decision). Given the lack of precedent in this circuit and the weight of authority from the other circuits, it would appear that the CSRA would preclude review based on Plaintiffs' claims for equitable relief. Nevertheless, the court will address the constitutional claims to determine if they can survive dismissal. Jurisdiction would be based on 28 U.S.C. § 1331.

A. Privacy Act Claim

Plaintiffs allege some sort of constitutional violation relating to privacy. The complaint does not set out specifically what acts by Defendants constituted such a violation. Nevertheless, although Plaintiffs do not specifically cite the

Privacy Act as a basis for jurisdiction, the relief they seek concerning the correction of the records would indicate an attempt to assert a claim under the Privacy Act. Therefore, the court will address the claim as one under the Privacy Act.

Section 552a(g)(1)(C) of the Privacy Act states that an individual may bring an action if an agency fails to maintain accurate records in determining the qualifications, character, rights, or opportunities of, or benefits to the employee that may be made on the basis of such record, if an adverse decision is made against the employee based on that record. 5 U.S.C. § 552a(g)(1(C). Thus, Plaintiffs request for relief in striking statements from his personnel filed would appear to be a claim under this section.

In Houlihan v. Office of Personnel Management, 909 F.2d 383, 385, (9th Cir. 1990), the Ninth Circuit noted that review of any alleged violation of the Privacy Act regarding an administrative decision would necessitate a review of the underlying personnel decisions. The court then found that allowing a Privacy Act claim under those circumstances would "'open the back door to judicial review to perhaps an overwhelming number ' of CSRA claims." Id. citing Rosen v. Walters, 719 F.2d 1422, 1425 (9th Cir. 1983). The court then found that because this result would "be squarely at odds with the CSRA's statutory scheme," it would be precluded by the CSRA. Id.

Accordingly, because review of any alleged errors in Plaintiff's personnel file would require review of the underlying personnel decisions, and review of such decisions is available under the CSRA, any Privacy Act claim maintained by Plaintiff must be dismissed.

B. Equal Protection Claim

Plaintiffs' allege that the statutory scheme provided by the CSRA improperly discriminates against employees by not

providing for proper judicial review for employees who suffer from prohibited personnel actions which are not considered adverse actions under chapter 75. Specifically, Plaintiffs argue that the CSRA does not provide sufficient judicial redress for employees who are victims of prohibited personnel actions.

Plaintiffs do not argue that they belong to a suspect class. They merely state that employees who suffer from administrative action which is less than an "adverse" action are denied equal protection regarding access to the courts. Where a challenged statute implicates no suspect class, the court's review is limited to determining whether the statute's scheme is rationally related to a legitimate governmental purpose. Mountain Water Co. v. Montana Dept. of Public Service Regulation, 919 F.2d 593, 597 (9th Cir. 1990), citing Kadrmas v. Dickinson Public Schools, 487 U.S. 450, 457-58 (1988).

The inclusion in the CSRA of judicial review for adverse personnel actions but not for lesser personnel actions reflects a conscious decision by Congress to limit the availability of review. At least one legitimate purpose for such a distinction comes readily to the court's attention - the need to avoid the escalating costs and overcrowding in the federal court system. Providing for administrative review and limited judicial review would be rationally related to such a legitimate purpose. As such, Plaintiffs Equal Protection claim would also need to be dismissed.

C. Freedom of Speech and Assembly

Plaintiffs have already admitted that they are bringing their whistleblower claim in the Federal Circuit Appellate Court. They do not appear to allege that any other actions outside of the alleged retaliation for their whistleblowing violated their First Amendment right to free speech. As the court noted above, it has no jurisdiction over that claim and Plaintiffs can adequately address this issue before the Appellate Court.

As to their claim of a violation of their First Amendment right to freedom of assembly, Plaintiffs appear to allege that they were censured for a meeting they held at their home where they invited members of the office in which he worked and a representative of Congressman Morris Udall's staff to discuss the handling of his grievances. It seems clear to the court that any alleged censure resulting from this assembly would have been the result of the original whistleblower grievance. As that claim is properly before the Federal Circuit Court of Appeals, the court has no jurisdiction to address this issue.

D. Due Process Claim

Plaintiffs do not specifically allege the loss of any particular property or liberty interest. Any possible due process violation resulting from the suspension would have been brought before the MSPB and thus would now be properly before the appellate court. As for procedural due process, Plaintiffs do not dispute that they were afforded all of the administrative procedural process to which they were entitled.

However, Plaintiffs allege irregularities in the implementation of the grievance procedures. These complaints were brought before the OSC, which found no constitutional violations. As noted above, the court will only determine the limited issue of whether the OSC discharged its statutory duty to investigate.

Accordingly, for the reasons above stated,

IT IS HEREBY ORDERED that Defendant's Motion to Dismiss with Prejudice (#3) is granted in part and denied in part.

IT IS FURTHER ORDERED that Defendant's Motion to Dismiss (#3) is granted on Plaintiffs' Second and Third Claims for Relief, as well as on their First Claim for Relief concerning the Whistleblowing activity.

IT IS FURTHER ORDERED that Defendant's Motion to Dismiss (#3) is denied on Plaintiffs' First Claim for Relief as it applies to limited review of the OSC's fulfillment of its statutory duty to investigate.

DATE: 25 Nov 1992

L.D.George

LLOYD D. GEORGE
Chief United States District Judge

AFFIDAVIT OF LEONARD M. DRIBINSKY

I, Leonard M. Dribinsky, state the following;

1. I am the Deputy Associate Special Counsel for Prosecution of the Office of Special Counsel (OSC). As part of my duties, I act as a deciding official on allegations of prohibited personnel practices (5 U.S.C. § 2301(b) received by OSC's Complaints Examining Unit (CEU).

2. OSC is required by U.S.C. § 1214(a)(1) to receive allegations of prohibited personnel practices and to investigate such allegations to the extent necessary to determine whether there are reasonable grounds to believe a prohibited personnel practice has occurred, exists, or is to be taken. 5 U.S.C. § 1214(a)(1)(A). New allegations of prohibited personnel practices are assigned to a complaints examiner in the CEU for an initial review. The complaints examiner, who is an attorney or a personnel management specialist, reviews all submitted documentary support, if any, and makes a preliminary inquiry of the allegations by telephone as necessary to support a recommendation for further action. Upon completion of the inquiry, the examiner prepares a summary of the allegations and a brief description of the facts. It is within my discretion to accept, reject, modify, or revise the recommendation.

4. I am informed and believe that on June 29, 1989, OSC received by mail from Del Kidd allegations of prohibited personnel practices and supporting documentation. Mr. Kidd's allegations were assigned to a complaints examiner in CEU, for initial review and recommendation. I have personal knowledge that the matter was assigned to an experienced complaints examiner. During the regular course of his duties as a complaints examiner, he reviewed the allegations

and supporting documentation, spoke by telephone with Mr. Kidd and another witness, and prepared a brief written summary and analysis of the allegations.

5. I am informed and believe that on July 10, 1989, and July 7, 1989, the CEU examiner's summary and recommendation were reviewed by myself and Ralph Eddy, Chief of CEU. Based on the CEU examiner's recommendation and Eddy's concurrence, I determined that OSC would not take further action on the allegations. The reasons for the decision were summarized in a July 17, 1989, letter to Mr. Kidd over my signature. This letter informed Mr. Kidd of our decision as required by 5 U.S.C. § 1214(a)(2)(A). The letter is attachment A to this affidavit.

6. I am informed and believe that on August 7, 1990, OSC received by mail from Mr. Kidd additional allegations of prohibited personnel practices and supporting documentation. Mr. Kidd's allegations were assigned to a complaints examiner in CEU, for initial review and recommendation. I have personal knowledge that the matter was assigned to an experienced complaints examiner. During the regular course of her duties as a complaints examiner, she reviewed the allegations and supporting documentation, spoke by telephone with Mr. Kidd, and prepared a brief written summary and analysis of the allegations.

7. I am informed and believe that on December 4, 1990, and December 3, 1990, the CEU examiner's summary and recommendation were reviewed by myself and Ralph Eddy, Chief of CEU. Based on the CEU examiner's recommendation and Eddy's concurrence, I determined that OSC wold not take further action on the allegations. The reasons for the decision were summarized in a January 2, 1991, letter to Mr. Kidd over my signature. This letter informed Mr. Kidd of our decision as required by 5 U.S.C. § 1214(a)(2)(A). The letter is attachment B to this affidavit.

8. I am familiar with the reasons given for the closure decisions as stated in attachments A and B. OSC's closure decisions were proper and in accordance with the laws and regulations under which OSC operates. Mr. Kidd's allegations were handled according to normal OSC operating procedure.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief. Executed on June 28, 1993, in Washington, D.C.

Leonard M. Dribinsky
Deputy Associate Special
Counsel for Prosecution

ATTACHMENT A

OFFICE OF SPECIAL COUNSEL

JUL 17 1989

Mr. Del Kidd
332 Palo Verde
Yuma, AZ 85364

RE: OSC File No. MA-89-0909

Dear Mr Kidd,

This is in response to your complaint against the Bureau of Reclamation. You allege that you were reassigned in reprisal for filing a grievance. You also allege that the reassignment is an attempt to force you to retire. Finally, you requested that the Special Counsel seek a stay of the reassignment from the Merit Systems Protection Board.

The Office of the Special Counsel is authorized by the Civil Service Reform Act to investigate allegations of prohibited personnel practices and activities prohibited by civil service law, rule, or regulation. 5 U.S.C. §§1214(a)(1)(A), 1216(a), and 2302(b). We have carefully considered the information you provided and that obtained from the agency. However, we have found insufficient evidence of any prohibited personnel practices or other violations warranting further inquiry by this Office.

More specifically, you alleged that you were reassigned in reprisal for filing a grievance on April 14, 1989. However, from a review of the information provided by the agency, it

appears that agency officials were discussing your possible reassignment as early as January 1989, and made the final decision to effect the action in mid-March 1989. Therefore, since the decision appears to have been made prior to the grievance, there is no basis for further inquiry into the reassignment as possible act of reprisal in violation of 5 U.S.C. §2302(b)(9).

You also allege that the reassignment is an attempt to force you to retire. From a review of the information you provided, it appears that there is a strained working relationship between you and the management of your organization. Therefore, since a reassignment is one means of dealing with such problems, it would be extremely difficult to establish that the reassignment was other than a legitimate attempt to address the problems between you and your management.

Accordingly, your request for a stay has been denied and we have closed our file on this matter. this letter should not be construed as an adjudication of any matter you have pending or plan to file under any administrative appeals procedure.

Sincerely,

Leonard M. Dribinsky
Deputy Associate Special Counsel
for Prosecution

LMD:RBE:PC/pc

ATTACHMENT B

U.S. OFFICE OF SPECIAL COUNSEL
1120 Vermont Avenue, N.W., Suite 1100
Washington, D.C. 20005-3561

Mr. Del Kidd
1303 Darlene, 406B
Boulder City, NV 89005

Re: OSC File No. MA-90-1384

Dear Mr. Kidd:

This is in response to your complaint to the Office of Special Counsel in which you make several allegations against the Bureau of Reclamation in Boulder City, Nevada. You allege that your supervisors have discriminated against you based on your age. You also allege that the Bureau has reprised against you for the filing of two grievances and making disclosures of information. You further claim that the Bureau has taken an action against you based on conduct which does not affect your work performance, and that the Bureau has violated the Merit Systems Principles.

The Office of Special Counsel is authorized to investigate allegations of activities prohibited by civil service law, rule, or regulation, and prohibited personnel practices. 5 U.S.C. §§ 1214(a)(1)(A), 1216(a), and 2302(b).

Discrimination is a prohibited personnel practice within the investigative jurisdiction of the Office of Special Counsel. 5 U.S.C. 2302 (b)(1). However, it was not intended that this

office duplicate or bypass the procedures established in the agencies and the Equal Employment Opportunity Commission for resolving such discrimination complaints. Therefore, it is the general policy of the Special Counsel not to take action on such allegations of discrimination; they are more appropriately resolved through the EEO process. 5 C.F.R. § 1810.1. In light of the information you have provided, we find no reason to depart from our policy in this ;matter. Thus, we will take no further action concerning your allegation of discrimination.

To take or fail to take, or threaten to take or fail to take, any personnel action with respect to any employee because of any disclosure by an employee which the employee reasonably believes evidences a violation of any law, rule, or regulation, or gross mismanagement, a gross waste of funds, or an abuse of authority, is also a prohibited personnel practice within the investigative jurisdiction of the Special Counsel. 5 U.S.C. § 2312(b)(8). However, it does not appear that any such disclosures were made by you. You claim that several employees of YPO made such disclosures during a meeting at your home with a member of Congressman Udall's staff. No violation of 5 U.S.C. § 2302(b)(8) can be shown unless you made disclosures or management thought you made disclosures. Assuming you provided the staff member with similar information and management was aware that you disclosed this information or thought you disclosed this information, a connection must then be established between these disclosures and your suspension. It appears that you suspension was effected due to repeated statements you made concerning your former supervisors starting a fire at your home and not for any disclosures made to a member of Congressman Udall's staff. Therefore, we would be unable to prove before the Merit Systems Protection Board (M.S.P.B.(that a violation of 5 U.S.C. § 2302 (b)(8) has occurred.

It is also a prohibited personnel practice to threaten to take or fail to take, or take or fail to take a personnel action against any employee because of: (1) the exercise of an appeal, complaint or grievance right granted by any law, rule or regulation; (2) testify or otherwise lawfully assisting any individual in the exercise of any such right, or for cooperating with or disclosing information to Inspector General of any agency, or to the Special Counsel; or (3) for refusing to obey an order that would require the individual to violate the law. 5 U.S.C. § 2301(b)(9) (as amended, 1989). However, there is insufficient evidence that your suspension was in reprisal for the filing of grievances or filing a complaint in court. Rather, it appears your suspension resulted from your continuous statements regarding your former supervisors and their role in the fire at your home; you persisted in making such statements even after the Clerk of the Yuma County Municipal Court determined that there was insufficient evidence to schedule a hearing to have the injunctions continued. Therefore, we would not be able to prove before the M.S.P.B. that a violation of 5 U.S.C. § 2302(b)(9) exists.

It is also a prohibited personnel practice to discriminate for or against any employee or applicant for employment on the basis of conduct which does not adversely affect the performance of the employee or applicant or the performance of others; except that an agency is not prohibited from taking into account, in determining suitability or fitness, any conviction of the employee or applicant for any crime under the laws of any state, or the District of Columbia, or of the United States. 5 U.S.C. § 2302(b)(10). By contacting current and former employees of your former supervisors it appears you may have affected the working relationships of these individuals and that your statements may have injured the reputations of your former supervisors thereby hampering their ability to form

and continue positive working relationships with the employees of YPO. Therefore, we could not prove before the M.S.P.B. that your conduct did not adversely affect the performance of others. Thus, no violation of 5 U.S.C. § 2302 (b)(10) occurred.

It is also a prohibited personnel practice to take or fail to take any other personnel action if taking or failing to take such action violates any law, rule, or regulation implementing, or directly concerning, the merit systems principles defined in 5 U.S.C. § 2301. 5 U.S.C. § 2302(b)(11). However, it does not appear that the agency violated any law, rule, or regulation by suspending you. The agency suspended you for statements made about your former supervisor, This does not appear to constitute any violation of your first amendment rights of free speech or peaceable assembly. Therefore, after carefully considering the information you provided, we have found insufficient evidence of any prohibited personnel practices or other violations warranting further inquiry by this office.

You request that this office seek a stay from the Merit Systems Protection Board of your removal. We do not petition the Merit Systems Protection Board for a stay of every action alleged to be a prohibited personnel practice. A stay is a remedy that can be considered only after we have determined that there are reasonable grounds to believe that a prohibited personnel practice has been or is about to be committed. 5 U.S.C. § 1214(b)(1). We have reviewed the information that you have submitted and that we have obtained upon further inquiry, but we are unable to find reasonable grounds to believe that the agency has proposed or taken any action as a result of a prohibited personnel practice. Thus, we have decided not to petition the Board for a stay at this time.

Accordingly, in the absence of any other issue within our investigative jurisdiction, we plan no further action and are closing our file in this matter. You may, however, have a right to seek corrective action from the Merit Systems Protection Board under the provisions of 5 U.S.C. §§ 1214(a)(3) and 1221. You may file a request for corrective action with the Board within 65 days after the date of this letter. The Merit Systems Protection Board regulations concerning rights to file a corrective action case with the Board can be found at 5 C.F.R. Parts 1201-1206 and 1209.

This letter should not be construed as an adjudication of any matter you have pending or plan to file under any administrative appeals procedure.

Sincerely,
Leonard M. Dribinsky
Deputy Associate Special Counsel
for Prosecution

LLD;RBE;PAS/ps

Sec. 2. FINDINGS AND PURPOSE.

/////

(b) PURPOSE. - The purpose of this Act is to strengthen and improve protection for the rights of Federal employees, to prevent reprisals, and to help eliminate wrongdoing within the Government by -

(1) mandating that employees should not suffer adverse consequences as a result of prohibited personnel practices; and

2) establishing -

(A) that the primary role of the Office of Special Counsel is to protect employees, especially whistleblowers, from prohibited personnel practices;

(B) that the Office of Special Counsel shall act in the interests of employees who seek assistance from the Office of Special Counsel; and

(C) that while disciplining those who commit prohibited personnel practices may be used as a means by which to help accomplish that goal, the protection of individuals who are the subject of prohibited personnel practices remains the paramount consideration.

5 U.S.C. §1212. Powers and functions of the Office of Special Counsel

(a) The Office of Special Counsel shall -

(1) in accordance with section 1214(a) and other applicable provisions of this subchapter, protect employees, former employee or applicant for employment from prohibited personnel practices:

(2) receive and investigate allegations of prohibited personnel practices, and where appropriate -

(A) bring petitions for stays, and petition for corrective action, under section 1214; and

(B) file a complaint or make recommendations for disciplinary action under section 1215;

(3) receive, review, and, where appropriate, forward to the Attorney General or an agency head under section 1213, disclosures of violations of any law, rule, or regulation, or gross mismanagement, a gross waste of funds, an abuse of authority ...;

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(5) investigate and, where appropriate, bring actions concerning allegations of violations of other laws within the jurisdiction of the Office of Special Counsel (as referred to in section 1216.

§ 1213. Provisions relating to disclosures of violations of law, gross mismanagement, and certain other matters

(a) This section applies with respect to -

(1) any disclosure of information by an employee, ... which the employee ... reasonably believes evidences -

(A) a violation of any law, rule, or regulation; or

(B) gross mismanagement, a gross waste of funds, abuse of authority, or ...

/////

(2) any disclosure by an employee, ... to the Special Counsel or to the Inspector General of any agency or another employee designated by the head of the agency to receive such disclosures of information which the employee, ... reasonably believes evidences -

(A) a violation of any law, rule, or regulation; or

(B) gross mismanagement, a gross waste of funds, an abuse of authority, ...

(b) Whenever the Special Counsel receives information of a type described in subsection (a) of this section, the Special Counsel shall review such information and, within 15 days after receiving the information, determine whether there is a substantial likelihood that the information discloses a violation of any law, rule, or regulation, or gross mismanagement, gross waste of funds, abuse of authority, or ...

(c) (1) Subject to paragraph (2), if the Special Counsel makes a positive determination under subsection (b) of this section, the

Special Counsel shall promptly transmit the information with respect to which the determination was made to the appropriate agency head and require that the agency head -

(A) conduct an investigation with respect to the information and any related matters transmitted by the Special Counsel to the agency head; and

(B) submit a written report setting forth the findings of the agency head within 60 days after the date on which the information is transmitted to the agency head or within any longer period of time agreed to in writing by the Special Counsel.

§ 1214. Investigation of prohibited personnel practices; corrective action.

(a)(1)(A) The Special Counsel shall receive any allegation of a prohibited personnel practice and shall investigate the allegations to the extent necessary to determine whether there are reasonable grounds to believe that a prohibited personnel practice has occurred, exists, or is to be taken.

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(2)(A) If the Special 'Counsel terminates any investigation under paragraph (1), the Special Counsel shall prepare and transmit to any person on whose allegation the investigation was initiated a written statement notifying the person of -

(i) the termination of the investigation;

(ii) a summary of relevant facts ascertained by the Special Counsel, including the facts that support, and the facts that do not

support, the allegations of such person; and

(iii) the reasons for terminating the investigation.

/////

(3) Except in a case in which an employee, ... has the right to appeal directly to the Merit System Protection Board under any law, rule, or regulation, any such employee, ... shall seek corrective action from the Special Counsel before seeking corrective action from the Board. An employee ... may seek corrective action from the Board under section 1221, if such employee, ... seeks corrective action for a prohibited personnel practice described in section 2302(b)(8) from the Special Counsel. and

(A)(i) the Special Counsel notifies such employee, ... that an investigation concerning such employee ... has been terminated; and

(ii) no more that 60 days have elapsed since notification was provided to such employee, ... that such investigation was terminated; or

(B) 120 days after seeking corrective action from the Special Counsel, such employee, ... has not been notified by the Special Counsel that the Special Counsel shall seek corrective action on behalf of such employee, ...

/////

(b)(1)(A)(i) The Special Counsel may request any member of the Merit System Protection Board to order a stay of any personnel action for 45 days if the Special Counsel determines that there are reasonable grounds to believe that the personnel action was taken, or is to be taken as a result of a prohibited personnel practice.

(b)(2)(A) If, in connection with any investigation, the Special

Counsel determines that there are reasonable grounds to believe that a prohibited personnel practice has occurred, exists, or is to be taken which requires corrective action, the Special Counsel shall report the determination together with any findings or recommendations to the Board, the agency involved and to the Office of Personnel Management, and may report such determination, findings and recommendations to the President. The Special Counsel may include in the report recommendations for corrective action to be taken.

(B) If, after a reasonable period of time, the agency does not act to correct the prohibited personnel practice, the Special Counsel **may** petition the Board for corrective action.

/////

(C)(3) Whenever the Special Counsel petitions the Board for corrective action, the Board shall provide an opportunity for -

(A) oral or written comments by the Special Counsel, the agency involved, and the Office of Personnel Management; and

(B) written comments by any individual who alleges to be the subject of the prohibited personnel practice.

/////

(c)(1) Judicial review of any final order or decision of the Board under this section may be obtained by any employee, ... adversely affected by such order or decision.

§ 1216 Other matters within the jurisdiction of the Office of Special Counsel.

(a) In addition to the authority otherwise provided in this chapter, the Special Counsel shall, except as provided in subsection (b), conduct an investigation of any allegations concerning -

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(3) arbitrary or capricious withholding of information prohibited under 552,...

(4) activities prohibited by any civil service, law, rule, or regulation including any activities relating to political intrusion in personnel decisionmaking;

///

(c)(1) If an investigation by the Special Counsel under subsection (a)(1) substantiates an allegation relating to any activity prohibited under section 7324, the Special Counsel may petition the Merit System Protection Board for any penalties provided under section 7325.

(2) If the Special Counsel receives an allegation concerning any matter under paragraph (3), (4), or (5) of subsection (a), the Special Counsel may investigate and seek corrective action under section 1214 in the same way as if a prohibited personnel practice were involved.

§ 1221. Individual right of action in certain reprisal cases.

(a) Subject to the provisions of subsection (b) of this section and subsection 1214(a)(3), an employee, ... may with respect to any personnel action taken, or proposed to be taken, against such employee, ... as a result of a prohibited personnel practice described in section 2302(b)(8), seek corrective action from the Merit Systems Protection Board.

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(h)(1) An employee, ... adversely affected or aggrieved by a final order or decision of the Board under this section may obtain judicial review of the order or decision.

§ 2301. Merit System Principles

(a) This section shall apply to -

(1) an Executive agency;

/////

(b)(2) All employees and applicants for employment should receive fair and equitable treatment in all aspects of personnel management ... with proper regard for their privacy and constitutional rights.

/////

(b)(9) Employees should be protected against reprisal for the lawful disclosure of information which the employees reasonably believe evidences -

(A) a violation of any law, rule, or regulation, or

(B) mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.

/////

§ 2302. Prohibited personnel practices

(a)(1) For the purposes of this title, "prohibited personnel practice" means any action described in subsection (b) of this section.

(2) For the purpose of this section-

(A) "personnel action" means -

/////

(iii) an action under chapter 75 of this title or other disciplinary or corrective action;

/////

(iv) a detail, transfer, or reassignment;

/////

(x) any other significant change

in duties or responsibilities which is inconsistent with the employee's salary or grade level;

/////

(b) Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority-

/////

(8) take or fail to take a personnel action with respect to any employee or applicant for employment as a reprisal for -

(A) a disclosure of information by an employee or applicant which the employee or applicant reasonably believes evidences -

(i) a violation of any law, rule, or regulation, or

(ii) mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety,

if such disclosure is not specifically prohibited by law and if such information is not specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs; or

(B) a disclosure to the Special Counsel of the Merit System Protection Board, or to the Inspector General of an agency or another employee designated by the head of the agency to receive such disclosures, or information which the employee or applicant reasonably believes evidences-

(i) a violation of any law, rule, or regulation, or

(ii) mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety;

(9) take or fail to take any personnel action against any employee or applicant for employment as reprisal for the exercise of any appeal right granted by any law, rule, or regulation;

/////

(11) take or fail to take any other personnel action if the taking of or failure to take such action violates any law, rule, or regulation implementing, or directly concerning, the merit system principles contained in section 2301 of this title.

Supreme Court, U.S.
FILED
SEP 12 1995
OFFICE OF THE CLERK

No. 94-2117

In the Supreme Court of the United States

OCTOBER TERM, 1995

DEL KIDD AND JUDY KIDD, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

DREW S. DAYS, III
Solicitor General

FRANK W. HUNGER
Assistant Attorney General

MARLEIGH D. DOVER
SANDRA WIEN SIMON
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the Civil Service Reform Act of 1978 (CSRA) precludes federal courts from granting equitable relief for constitutional violations in federal employment.

2. Whether the CSRA violates the separation of powers doctrine because it does not provide for judicial review of certain conclusions by the Office of Special Counsel that charges filed by federal employees are without merit.

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In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 94-2117

DEL KIDD AND JUDY KIDD, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A2-A11) is unpublished, but the judgment is noted at 59 F.3d 175 (Table). The orders of the district court (Pet. App. A13-A18, A19-A27) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 13, 1995. A petition for rehearing was denied on March 29, 1995. Pet. App. A1. The petition for a writ of certiorari was filed on June 26, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Employment with the federal government is governed by the Civil Service Reform Act of 1978 (CSRA), Pub. L. No. 95-454, 92 Stat. 1111. In enacting the CSRA, Congress comprehensively overhauled the civil service system and replaced a "patchwork system" of statutes and rules governing review of federal personnel actions with "an integrated scheme of administrative and judicial review, designed to balance the legitimate interests of the various categories of federal employees with the needs of sound and efficient administration." *United States* v. *Fausto*, 484 U.S. 439, 445 (1988).

In the CSRA, Congress created several categories of employees and personnel actions and provided different avenues of administrative and judicial review for each category. If a federal employee is the subject of a serious adverse personnel action, such as removal or suspension for more than 14 days (see 5 U.S.C. 7512), the employee may (with certain exceptions) appeal the action to the Merit Systems Protection Board (MSPB) (5 U.S.C. 7513(d)) and thereafter seek review in the United States Court of Appeals for the Federal Circuit (5 U.S.C. 7703). If an employee is suspended for 14 days or less, the employee may not appeal directly to the MSPB. However, if the employee believes that such a minor personnel action was the result of a "prohibited personnel practice" (see 5 U.S.C. 2302), the employee may petition the Office of Special Counsel (OSC) for relief. See 5 U.S.C. 1214(a)(1)(A).

OSC has jurisdiction to investigate allegations that personnel actions were taken in violation of the Whistleblower Protection Act of 1989, Pub. L. No.

101-12, § 3(a)(13), 103 Stat. 21, which prohibits reprisals for federal employees' lawful disclosure of information relating to violations of law, mismanagement, and abuse of authority. See 5 U.S.C. 2302(b)(8). If OSC determines that a personnel action was not taken in violation of the Whistleblower Protection Act, the employee may obtain further review of that determination by requesting "corrective action" from the MSPB. See 5 U.S.C. 1214(a)(3), 1221. The employee may also seek judicial review of the MSPB's decision in the Federal Circuit. See 5 U.S.C. 7703(b)(1).

2. Petitioner Del Kidd is an employee of the Bureau of Reclamation, an agency of the Department of the Interior. Pet. 2.[1] Petitioner filed several grievances with the agency concerning, among other things, his transfer from the agency's Yuma, Arizona, office to its Boulder City, Nevada, office, and his suspension for 14 days without pay for accusing his superiors of being involved in a fire at his house. See Complaint ¶¶ 5, 14-16, 36. In 1989, petitioner also filed complaints with OSC concerning the same personnel actions. Pet. 4-7. Petitioner's first complaint to OSC charged that his 14-day suspension from employment was motivated by age discrimination and retaliation for whistleblowing. Pet. App. A33. In the second complaint, petitioner charged that his superiors had transferred him to Nevada to retaliate for his filing a grievance and to force him to retire. *Id.* at A31.

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[1] Although Judy Kidd is also named as a petitioner, it is clear from the petition and the complaint that this case arises entirely out of Del Kidd's employment history. Therefore, we refer to Del Kidd as "petitioner."

As to the age discrimination claim, OSC informed petitioner that its general policy is not to duplicate other agency equal employment opportunity (EEO) procedures, and OSC referred petitioner to the agency's EEO process for that claim. Pet. App. A33-A34. After an investigation of petitioner's other complaints, OSC found insufficient evidence to substantiate the charges. *Id.* at A28-A37. In particular, OSC concluded that petitioner had been suspended from employment, not for making protected disclosures of information, but "due to repeated statements [petitioner] made concerning [his] former supervisors starting a fire at [his] home." *Id.* at A34.

Petitioner then sought administrative and judicial review of OSC's decision not to pursue his various claims. First, petitioner sought review by the MSPB, under the Whistleblower Protection Act, 5 U.S.C. 1221(e) (Supp. V 1993), of OSC's conclusion that he had not suffered retaliation for whistleblowing. The MSPB ruled that petitioner was not entitled to relief under the Whistleblower Protection Act because none of his allegations involved disclosures protected under that Act. The court of appeals affirmed. *Kidd* v. *Department of Interior*, No. 91-3546 (Fed. Cir. July 12, 1993), cert. denied, 114 S. Ct. 1060 (1994).

Petitioner next filed suit against the United States and various agencies and individuals in district court, seeking damages for alleged constitutional and common law torts of defamation, negligence, deprivation of due process, intentional infliction of mental distress, abuse of authority, and civil conspiracy arising from his employment and the handling of his grievances. The district court dismissed his complaint, and the court of appeals affirmed, concluding that the

CSRA precluded all of petitioner's claims brought under the Federal Tort Claims Act and *Bivens*.[2] *Kidd* v. *United States*, Nos. 92-15657 & 92-16455 (9th Cir. Oct. 7, 1993), cert. denied, 114 S. Ct. 1643 (1994).

Finally, petitioner filed this action in district court, alleging that the United States and its agencies had violated his due process, equal protection, privacy, and First Amendment rights. Pet. 7. Petitioner requested that the court "vacate specific decisions made by the Bureau of Reclamation, Department of Interior, Office of Hearings and Appeals, Office of Special Counsel and Merit System Protection Board" and expunge all evidence of personnel actions taken against him relating to his various grievances. Complaint ¶ 25. The complaint also requested declaratory relief under the Administrative Procedure Act (APA), a ruling whether the CSRA's remedial system protects the constitutional rights of federal employees, and a decision whether the CSRA comports with the Constitution. See Pet. 3.

3. The district court dismissed petitioner's claims in two orders. The court first concluded that it lacked jurisdiction to hear petitioner's claim that his due process and First Amendment rights were violated when the MSPB improperly denied his whistleblower claim. The court noted that, under 5 U.S.C. 7703(b)(1), the Federal Circuit has exclusive jurisdiction to review final decisions of the MSPB, which had heard petitioner's whistleblower claim. Pet. App. A20-A21. The court further held that, although it could not review the merits of OSC's determination

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[2] *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

on petitioner's whistleblower claim, it could review the case to determine whether OSC had "discharged its duty to investigate" the claim. *Id.* at A21-A22. The court subsequently ruled that OSC had fully discharged its duty to investigate. *Id.* at A17.

As to petitioner's remaining constitutional claims of deprivation of due process, equal protection, First Amendment rights, and the right to privacy, the court observed, "it would appear that the CSRA would preclude review based on [petitioner's] claims for equitable relief." Pet. App. A23. Nevertheless, the court stated that it would "address the constitutional claims to determine if they can survive dismissal," *ibid.*, and found them all without merit.

The court first noted that the complaint "allege[s] some sort of constitutional claim relating to privacy [but] * * * does not set out specifically what acts * * * constituted such a violation." Pet. App. A23. The court interpreted the complaint as raising a claim under the Privacy Act of 1974, 5 U.S.C. 552a(g)(1)(C). The court concluded that the CSRA precluded it from affording any relief for a violation of the Privacy Act, because a "review of any alleged violation of the Privacy Act regarding an administrative decision would necessitate a review of the underlying personnel decisions," which would " 'open the back door to judicial review [of] perhaps an overwhelming number' of CSRA claims." Pet. App. A24.

The court further concluded that it had no jurisdiction to review petitioner's First Amendment claim based on his termination, because that claim merely duplicated the whistleblowing claim that had been presented to the MSPB and the Federal Circuit. Pet. App. A25-A26. The court also noted that petitioner's

due process claims "would have been brought before the MSPB and thus would now be properly before the [Federal Circuit]" (*id.* at A26), and that those complaints had been brought to the attention of OSC, which had discharged its statutory duty to investigate and had found no constitutional violations (*ibid.*).

Finally, the court concluded that petitioner's equal protection claim lacked merit. The court observed that the CSRA does not afford judicial review to employees who suffer only a minor adverse personnel action, and who do not contend that the personnel action was based on a prohibited personnel practice, such as retaliation for whistleblowing. The court concluded, however, that the distinctions in the review scheme established by Congress in the CSRA are rationally related to legitimate governmental interests of avoiding escalation in court costs and overcrowded court dockets. Pet. App. A24-A25.

4. The court of appeals affirmed in an unpublished decision. Pet. App. A2-A11. The court held that the CSRA precludes district courts from affording injunctive relief for alleged deprivations of constitutional rights. *Id.* at A5-A6. The court relied on its prior decision in *Saul* v. *United States*, 928 F.2d 829, 843 (9th Cir. 1991), where it stated that "the CSRA's elaborate remedies show that judicial interference in federal employment is disfavored," and that "[t]he CSRA precludes [a plaintiff] from seeking injunctive relief for his asserted constitutional injury just as it precludes him from bringing a *Bivens* action for damages." Pet. App. A5-A6.

The court also affirmed the district court's dismissal of petitioner's complaint insofar as it sought

judicial review of OSC's termination of its investigation into his charge of whistleblower retaliation. Pet. App. A7-A8. The court reaffirmed its earlier statement, in *Veit* v. *Heckler*, 746 F.2d 508, 510-511 (9th Cir. 1984), that judicial review of OSC's actions is "limited, at most, to insuring compliance with the statutory requirement that the OSC performed an adequate inquiry." Pet. App. A7.

ARGUMENT

1. a. This Court has observed on several occasions that "[t]he CSRA established a comprehensive system for reviewing personnel action taken against federal employees." *Fausto*, 484 U.S. at 455; see also *Bush* v. *Lucas*, 462 U.S. 367, 368 (1983). The CSRA reflects Congress's judgment that, as a matter of "federal personnel policy," some remedies should be available to some classes of employees for some violations of law, but that other remedies should be precluded. See *id.* at 380-381. Thus, the question in this case, as it was in *Bush*, where the Court declined to fashion a damages remedy under *Bivens* for First Amendment violations in the federal employment context, is "whether an elaborate remedial system that has been constructed step by step, with careful attention to conflicting policy considerations, should be augmented by the creation of a new judicial remedy for the constitutional violation at issue." 462 U.S. at 388.

Many of the factors that led the Court to decline to fashion a nonstatutory damages remedy for federal employees also apply to petitioner's request for injunctive relief. Petitioner seeks, in effect, to have the courts set aside his employer's personnel decision (the transfer to Nevada) and imposition of a disciplin-

ary sanction (the 14-day suspension for accusing his supervisors of involvement with the fire at his house). In such circumstances, a remedy of injunctive relief would seriously disrupt the carefully designed system established by Congress that balances "the legitimate interests of * * * federal employees with the needs of sound and efficient administration." *Fausto*, 484 U.S. at 445. "The CSRA's elaborate remedies show that judicial interference in federal employment is disfavored, whether the employee requests damages or injunctive relief." *Saul*, 928 F.2d at 843.

The Ninth Circuit's conclusion that the CSRA precludes nonstatutory injunctive relief for constitutional violations in federal employment is consistent with the decisions of most of the other courts of appeals that have addressed the issue. See *Stephens* v. *Department of Health & Human Servs.*, 901 F.2d 1571, 1576 (11th Cir.), cert. denied, 498 U.S. 998 (1990); *Lombardi* v. *Small Business Admin.*, 889 F.2d 959, 961-962 (10th Cir. 1989); *Pinar* v. *Dole*, 747 F.2d 899, 909-912 (4th Cir. 1984), cert. denied, 471 U.S. 1016 (1985); see also *Broadway* v. *Block*, 694 F.2d 979, 986 (5th Cir. 1982). The courts of appeals have recognized that "the comprehensive nature of the procedures and remedies provided by the CSRA indicates a clear congressional intent to permit federal court review as provided in the CSRA or not at all." *Veit*, 746 F.2d at 511. "[I]n enacting the [CSRA] Congress meant to limit the remedies of federal employees bringing claims closely intertwined with their conditions of employment to those remedies provided in the statute." *Rivera* v. *United States*, 924 F.2d 948, 951 (9th Cir. 1991) (holding that CSRA also precludes

relief under Federal Tort Claims Act in action based on federal employment).

b. The District of Columbia Circuit has stated that the courts are not precluded "altogether" from granting injunctive relief to federal employees for constitutional violations. *Spagnola* v. *Mathis*, 859 F.2d 223, 229 (D.C. Cir. 1988) (en banc) (per curiam). In *Spagnola*, the court held that the CSRA preempted claims seeking damages for constitutional violations in the federal employment context, but it also stated that it had repeatedly "affirmed the right of civil servants to seek equitable relief against their supervisors, and the agency itself, in vindication of their constitutional rights." *Id.* at 230; see, *e.g.*, *Hubbard* v. *EPA*, 809 F.2d 1, 11-12 (D.C. Cir. 1986); *Williams* v. *IRS*, 745 F.2d 702, 705 (D.C. Cir. 1984) (per curiam); *Bartel* v. *FAA*, 725 F.2d 1403, 1415 (D.C. Cir. 1984).

This case, however, is not an appropriate vehicle to resolve any disagreement between the D.C. Circuit and the other courts of appeals about the availability of injunctive relief in the federal employment context, because petitioner's constitutional claims are plainly without substance. As the district court pointed out (Pet. App. A23-A24), petitioner failed to make a coherent argument as to how the actions of his supervisors could have violated his constitutional right to privacy. The district court also noted, with regard to petitioner's due process claim, that petitioner had failed to allege the deprivation of any specific liberty or property interest. *Id.* at A26.

Petitioner's First Amendment claim is, as the district court recognized, Pet. App. A25-A26, in essence a reprise of his claim that his supervisors retaliated against him for whistleblowing. That claim

was presented to and rejected by the MSPB, which held that petitioner's statements were not covered by the Whistleblower Protection Act; the MSPB's ruling was upheld by the Federal Circuit. See *ibid.* Even if the district court had subject matter jurisdiction over petitioner's First Amendment claim, the claim would be precluded by principles of collateral estoppel, for the MSPB's determination that petitioner was not a whistleblower is fatal to his First Amendment allegation. "When an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply *res judicata* to enforce repose." *United States* v. *Utah Construction & Mining Co.*, 384 U.S. 394, 422 (1966).

In *Utah Construction*, the Court held that a factual determination by the Advisory Board of Contract Appeals as to the cause of delay in completion of a contract was binding on the parties in a subsequent suit for breach of contract brought in the Court of Claims, even though the Board did not have authority to render a decision on the specific legal claims underlying the Court of Claims suit. The Court noted that any claim relevant to the government contract "can be couched in breach of contract language," and it observed that "[t]he contractual and statutory scheme would be too easily avoided if a party could compel relitigation of a matter once decided by a mere exercise of semantics." 384 U.S. at 419. Indeed, because of the costs of repetitive litigation, the Court has "long favored application of the common-law doctrines of collateral estoppel (as to issues) and res judicata (as to claims) to those determinations of

administrative bodies that have attained administrative finality. * * * Such repose is justified on the sound and obvious principle of judicial policy that a losing litigant deserves no rematch after a defeat fairly suffered, in adversarial proceedings, on an issue identical in substance to the one he subsequently seeks to raise." *Astoria Fed. Savings & Loan Ass'n* v. *Solimino*, 501 U.S. 104, 107-108 (1991); see also *Kremer* v. *Chemical Construction Corp.*, 456 U.S. 461, 484-485 & n.26 (1982).

As to petitioner's equal protection claim, which might be construed as a claim that the CSRA on its face violates the equal protection component of the Due Process Clause of the Fifth Amendment, the district court addressed that claim on the merits and correctly rejected it. The distinctions created by the CSRA "neither burden[] fundamental constitutional rights nor create[] suspect classifications, so [the] standard of review is that of rationality." *United States* v. *Sperry Corp.*, 493 U.S. 52, 65 (1989). Congress had a rational basis for affording federal employees the right to administrative and judicial review of major personnel actions (such as removal and suspension for more than 14 days), as well as minor personnel actions alleged to have been motivated by retaliation for whistleblowing, but not other, minor personnel actions. Congress could have legitimately concluded that administrative and judicial resources were appropriately dedicated to review of actions that cause a serious disruption of a federal employee's life, or that are alleged to have been motivated by reasons that are deemed particularly offensive but are also difficult to prove and therefore warrant further administrative and judicial review. Petitioner had the

benefit of that administrative and judicial review when he presented his whistleblowing claim to the MSPB and the Federal Circuit.

2. Petitioner also contends that the CSRA violates the separation of powers doctrine and the "constitutional fact" doctrine because it supposedly transfers jurisdiction over employees' constitutional claims to OSC. Pet. 7-11 & 15-18. Although petitioner recognizes that major personnel actions and actions alleged to be taken in retaliation for whistleblowing are subject to review by the MSPB and the Federal Circuit, he complains that "[t]he sole remedy available to victims of abuse of authority, violation of regulations, and mismanagement * * * is to report such violations to the OSC." Pet. 8. He argues that the CSRA's preclusion of judicial review of OSC's actions on such charges contravenes *Crowell* v. *Benson*, 285 U.S. 22 (1932).

In *Crowell*, the Court upheld a provision of the Longshoremen's and Harbor Workers' Compensation Act of 1927 that provided for workers' compensation claims to be decided by an administrative official within the United States Employees' Compensation Commission. See 285 U.S. at 42-44. The Court also stated that, "[i]n cases brought to enforce constitutional rights, the judicial power of the United States necessarily extends to the independent determination of all questions, both of fact and law, necessary to the performance of that supreme function," *id.* at 60, and it therefore construed the act to provide that the determination by the administrative official of the "fundamental or jurisdictional facts" was subject to *de novo* review by the courts, *id.* at 62-65.

Crowell was quite different from this case, in that it involved a statute that "displaced a traditional cause of action and affected a pre-existing relationship based on a common-law contract for hire." *Thomas* v. *Union Carbide Agricultural Prods. Co.*, 473 U.S. 568, 587 (1985). The CSRA, on the other hand, governs only the relationship between federal employees and the government, which has traditionally been subject to executive regulation and legislative discretion, not common law adjudication. *Crowell* distinguished cases involving private rights arising under the common law, in which Article III generally requires a judicial determination of issues of fact and law, from cases arising "between the Government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments," in which "the mode of determining matters of this class is completely within congressional control. Congress may reserve to itself the power to decide, may delegate that power to executive officers, or may commit it to judicial tribunals." 285 U.S. at 50. Thus, "the Court has long recognized that Congress is not barred from acting pursuant to its powers under Article I to vest decisionmaking authority in tribunals that lack the attributes of Article III courts. Many matters that involve the application of legal standards to facts and affect private interests are routinely decided by agency action with limited or no review by Article III courts." *Thomas*, 473 U.S. at 583 (citations omitted).

Congress therefore did not contravene Article III when it assigned administrative review of whistleblower claims to OSC and the MSPB, with judicial

review by the Federal Circuit, and assigned the duty to investigate other claims, not based on whistleblowing but alleging violations of regulations governing federal employment, to OSC. All of those claims involve "public rights" arising out of the federal employment relationship, not private, common law rights and liabilities traditionally within the purview of Article III courts. The CSRA provided petitioner with remedies within the agency, and resort to OSC. Pet. 5-7. Petitioner took advantage of those remedies, and his charges were fully reviewed by OSC. See also *Bush*, 462 U.S. at 386 (noting that "[c]onstitutional challenges to agency action [such as claims of First Amendment violations] are fully cognizable within [the CSRA] system"). The district court also considered and rejected petitioner's claim (which OSC and the MSPB may not have been able to review) that the CSRA violated principles of equal protection by denying him judicial review for certain claims. Petitioner therefore received all the judicial review to which he was entitled under Article III.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1994

DEL KIDD; JUDY KIDD, *Petitioners*,

v.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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ARGUMENTS

I. The district court did not rule on the merits of Kidd's constitutional claims. The court's discussion of those claims was clearly meant only to determine jurisdiction and cannot be construed as a ruling on the merits.

Kidd's constitutional claims were dismissed in district court for lack of subject matter jurisdiction.[1] It is elementary that jurisdiction is the threshold issue in every case in federal court. If a court is without jurisdiction of the subject matter, it is without power to adjudicate and the only action it can take is to order dismissal of the complaint. *Stewart v. U.S.*, 199 F.2d 517 (7th Cir., 1952.) Furthermore, it is the duty of the district court to ascertain whether it has jurisdiction before proceeding to hear and decide any case on its merits. *Battaglia v. Gen. Motors Corp.* 169 F.2d 254 (2nd Cir. 1948).

Clearly, the district court could not have ruled on the merits of Kidd's constitutional claims because it did not accept jurisdiction to do so. All statements in the Government's Brief in Opposition declaring that the court found Kidd's constitutional claims lacked merit should, therefore, be disregarded.

The court's discussion of Kidd's constitutional claims cannot be construed as a ruling on the merits. The court discussed the claims only to determine jurisdiction:

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[1] The district court assumed that all of Kidd's claims involving freedom of speech and assembly and some related to due process were linked to his whistleblower claims which were appealable only to the Merit System Protection Board. (MSPB) The court held, therefore, that it lacked jurisdiction of those claims. Pet. App. A-25-26. Likewise, the district court held and the Ninth Circuit affirmed that it lacked jurisdiction to provide injunctive relief with regard to the issues of privacy, equal protection, and due process. Pet. App. A-6.

- In discussing Kidd's privacy claim, the court reviewed "some sort of constitutional violation related to privacy."[2] Pet. App.. A-23. It then dismissed the claim, not because it lacked merit, but because review by the court "would open the back door to judicial review to perhaps an overwhelming number of CSRA claims." Pet. App. A-24.

- In discussing Kidd's equal protection claims, the court held that because the CSRA "implicates no suspect class, the court's review is limited to determining whether the statute's scheme is rationally related to a legitimate government propose." Pet. App. A-25. Kidd's equal protection claim was dismissed not because it lacked merit but because of the "need to avoid the escalating costs and overcrowding in the federal court system." Pet. App. A-25.

- In discussing Kidd's claims related to speech, assembly, and due process, the court incorrectly assumed that all such claims would have been within the jurisdiction of the MSPB and that they would have been presented and adjudicated there. These claims, too, were dismissed for lack of jurisdiction not lack of merit. Pet. App. A-25-26.

With regard to Kidd's claims that the government's actions had deprived him of procedural due process, the court noted that all such "irregularities" had been brought before the OSC, which found no constitutional violation. The court then assumed jurisdiction to determine only the limited issue of whether the OSC had discharged its statutory duty to investigate. Pet. App. A-26.

In its Brief in Opposition, the Government argues that the instant case is "not an appropriate vehicle" to decide the question presented because "petitioner's constitutional claims are plainly without substance." Opp. Brief p. 10. The Government then bases that argument on the false assertion that the district court found the claims to lack merit. Since the district court could not

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[2] If the pro se Complaint reviewed by the court was incomplete or unclear as to evidence of specific claims, the Complaint can be amended to fully define the allegations.

and did not rule on the merits of Kidd's constitutional claims, the Government's argument should be dismissed as spurious.

II. Collateral estoppel and res judicata do not apply here because the MSPB refused jurisdiction of all of Kidd's constitutional claims and ignored his private First Amendment claims.

In its Brief in Opposition, the Government argues that the "Petitioner's First Amendment claim is . .. in essence a reprise of his claim that his supervisors retaliated against him for whistleblowing. That claim was presented to and rejected by the MSPB ..." Opp. Brief, p. 10. And further, "When an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply res judicata to enforce repose." Citings omitted. Opp. Brief, p. 11.

The MSPB carefully limited its jurisdiction to exclude all of Kidd's claims that the agency's actions violated his constitutional rights.

After accepting jurisdiction of Kidd's 14-day suspension under the Whistleblower Protection Act (WPA), the MSPB excluded from review all issues dealing with or stemming from Kidd's having been placed on administrative leave, detailed out of his Yuma position, and transferred to Nevada, because those personnel actions occurred prior to July 9, 1989, the effective date of the WPA. Reply App. A-1 , and A-3[3]. With regard to Kidd's constitutional claims, the MSPB found that "appellant's claim that his constitutional rights have been abridged, in and of itself, is insufficient to bring this matter within the Board's jurisdiction... (The board does not have plenary jurisdiction.)" Reply App. A-8. And with regard to Kidd's claims of prohibited personnel practices, the MSPB found that "... as with the appellant's constitutional claim, the allegation that the agency has

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[3] The MSPB's Decision issued in this case is attached to this Reply Brief and referenced herein as Reply App.

committed a prohibited personnel practice is insufficient to bring this matter within Board jurisdiction." Reply App. A-9. Citings omitted. Nowhere does the MSPB Decision address or in any way adjudicate the issues of equal protection, due process, privacy or assembly.

With regard to Kidd's First Amendment claims, the MSPB distinguished between disclosures made in the public interest and protected under the WPA and those made solely in a private interest and not protected. Reply App. A-7. The distinction is especially significant in this case in that the MSPB Decision addresses only the issue presented by the agency and conspicuously ignores the disclosures that Kidd claimed evidenced whistleblowing.[4] Kidd's disclosures concerning allegations of agency wrongdoing in violation of his constitutional rights are all of a private nature and are, arguably, not protected under the WPA.

The Decision also ignores that fact that Kidd was suspended, in part, for having hosted a meeting in his home with a member of Congressman Morris Udall' staff and 14 fellow employees during which Kidd disclosed the agency's wrongdoing in his case and the others disclosed mismanagement and abuse of authority at the Yuma Project Office. Again, Kidd's disclosures

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[4] The reord showed that Kidd claimed his disclosures to the Secretary of the Interior and to two Congressmen -- that the agency had flagrantly violated the regulations governing his administrative leave, detail, and transfer and had violated the grievance regulations in his case -- constituted whistleblowing. These disclosures were contained in a six-page attachment to Kidd's September 11, 1989 letter to the Secretary with copies to the Congressmen. The letter was a contributing factor in Kidd's 14-day suspension. The same disclosures were made by Kidd to Congressman Morris Udal's staff person at a meeting hosted by the Kidds and attended by 14 fellow employees. The fact that Kidd hosted the meeting and made the disclosures was also a contributing factor in his 14-day suspension. The Government, on the other hand, claimed that the whistleblowing issue involved statements related to a fire at Kidd's home.

of abuse of authority and violation of regulation involved his private interests that the MSPB defined as unprotected by the WPA.

Since Kidd's private interest disclosures were not protected by the WPA and his First Amendment claim with respect to those disclosures was not adjudicated or in any way discussed by the MSPB, collateral estoppel and res judicata should not apply in the instant case.

III. The CSRA remedy does not provide adequate Article III protection.

It would seem undisputed that the CSRA provides no judicial remedy for a federal employee's job-related individual constitutional claims. The Government's statement of the relevant question concedes the point: "Thus, the question in this case ... is whether an elaborate remedial system that has been constructed step by step, with careful attention to conflicting policy considerations, should be **augmented** by the creation of a **new judicial remedy** for the constitutional violation at issue." Citings omitted. [Emphasis added.] Opp. Brief, p. 8.

It would also seem undisputed that, insofar as the WPA applies to disclosures of **public** interest, it does not contravene Article III.

However, neither the CSRA nor the WPA protects the federal employee's private constitutional rights on the job. As noted by the district court, under the CSRA Kidd's only recourse for violations of his constitutional rights was to report them to the OSC as prohibited personnel practices and ask for an investigation. Pet. App. A-22. But,

> "the right to petition the OSC is a constitutionally inadequate remedy because its protections are wholly discretionary. The statute directs the Special Counsel to "receive any allegations of a prohibited personnel practice and ... investigate the allegation to the extent necessary to determine whether there are reasonable grounds to believe that a prohibited personnel practice has occurred, exists, or is to be taken. 5 U.S.C. §1206(a)(I). If the special Counsel concludes that such reasonable grounds exist, it

> is directed to report that conclusion to the MSPB, the agency involved, and the Office of Personnel Management. 5 U.S.C. § 1206 (c)(I)(A). Any further action is wholly discretionary: the Special Counsel need not submit recommendations concerning corrective action to the MSPB, and the MSPB need not order corrective action. 5 U.S.C.§1206 (c)(A)-(B). Thus an employee who alleges constitutional violations surrenders control of his claim to the Office of Special Counsel that has vast discretion not to prosecute his action. By law, all he can do is force the OSC to investigate and consider his case; he cannot even challenge the OSC's disposition of his claim or seek judicial review to determine whether it was arbitrary, capricious, or unsupported by substantial evidence.[5] Because this procedure does not guarantee relief for unconstitutional actions, even those taken in violation of "clearly established" constitutional law, the CSRA remedy is constitutionally inadequate.[6]

Individual constitutional rights are not public rights nor is their adjudication discretionary. So, unless federal employees have now become the new Dred Scotts, Kidd's constitutional claims must be heard in federal court.

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[5] Judicial review of the OSC's decision whether to pursue a case is limited at most, to insuring compliance with the statutory requirement that the OSC perform an adequate inquiry on which to base its disposition of the employee's petition." *Cutts v. Lowler*, 692 F.2d 138, 140. (D.C. Cir. 1982) Although *Cutts* concerned OSC inquiries into charges of violations of statutes and not of the Constitution, subsequent courts have assumed that the limitations on judicial review hold in constitutional cases as well. See e.g. *Spagnola v. Mathis*, 859 F.2d 223.

[6] Bivens Doctrine In Flux; Statutory Preclusion of a Constitutional Cause of Action: Harvard Law Review, Vol. 101:1251 at 1263-65. Applicable citings included.

CONCLUSION

The arguments presented in the Government's Brief in Opposition do not defeat those presented in the Petition. The petition for a writ of certiorari should be granted.

Respectfully submitted.

Del and Judy Kidd
Petitioners, pro se

APPENDIX

UNITED STATES OF AMERICA
MERIT SYSTEM PROTECTION BOARD
DENVER REGIONAL OFFICE

DEL A. KIDD, Appellant,	)	
v.	)	DOCKET NUMBER DE122191W0210
DEPARTMENT OF THE INTERIOR Agency.	)	DATE: JUL 3 1991

Jerre Dixon, Esquire, Dixon & Snow, Denver, Colorado, for the appellant.
Bob Moeller, Esquire, Phoenix, Arizona, for the agency.

BEFORE
Steven L. Chaffin
Administrative Judge

INITIAL DECISION

INTRODUCTION

The appellant seeks Board review of his 14-day suspension, effective July 16, 1990. *See* Appeal Record, Tabs 1 and 4-41. The appellant asserts Board jurisdiction over the matter appealed by claiming the protection of the Whistleblower Protection Act of 1989.

The appellant was given the opportunity to present evidence and argument on the issue of whether he was a whistleblower under 5 U.S.C. § 2302(b)(8). And, because of allegations made by the appellant, a hearing was held on June 26, 1991. The appeal record closed upon the completion of the hearing.

For the reasons stated below, I find that the appellant is not a whistleblower and I DISMISS the appeal of his 14-day suspension.

ANALYSIS AND FINDINGS

Factual Background

Most of the facts of this case are undisputed. *See* Appeal Record, Tab 21 (Stipulated Facts). The appellant served in the position of Environmental Specialist, GS-12, in the Lower Colorado Division of the Bureau of Reclamation. On July 16, 1990, the appellant was suspended for 14 days for repeatedly accusing his former supervisor -- Ray Pritchett -- of setting fire to the appellant's home on August 26, 1989, and for writing a letter to prospective witnesses on April 13, 1990.

These accusations, as set forth in the notice of proposed removal, first occurred on the night of the fire, August 26, 1989. *See* Appeal Record, Tab 4-4M. Then, on the next Monday morning, August 28, the appellant and his wife secured injunctions against Pritchett and David Gudgel -- the appellant's second line supervisor -- in the Yuma, Arizona Municipal Court.[1] These injunctions indicated that Pritchett and Gudgel were to stop all acts of intimidation, threats, bodily harm, or acts causing property damage. *See* Appeal Record, Tab 5-4AA. The injunction also noted the fire at the appellant's house and stated a belief that Pritchett was capable of such arson.

Then, on September 11, 1989, the appellant wrote a letter to Manuel Lujan, Secretary of the Interior. *See* Appeal Record, Tab 5-4Y. In that letter, the appellant indicates that he suspected Pritchett and Gudgel of starting the fire at his house on August 26, 1989.

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[1] These injunctions were obtained *ex parte* and without a hearing. Thus, I do not consider the granting of the injunctions by the Yuma Municipal Court to be probative evidence that the allegations contained therein in support of the injunction were true.

In March of 1990, the appellant sought a renewal of the injunction against Pritchett and Gudgel. In seeking this renewal, the appellant raised the same accusations against the two individuals.

Finally, the notice of proposed suspension cites an April 13, 1990, letter the appellant wrote to 30 prospective witnesses for a grievance hearing.[2] That letter, noting the withdrawal of the grievance, suggests that the witnesses might also be subject to harassment by Pritchett and Gudgel. *See* Appeal Record, Tab 4-4Q.

Other, less germane facts, are also undisputed. The appellant had difficulty working under Pritchett's supervision for several years. During this period, reprimands were issued, grievances filed, and hearings held. This series of events presumably ended in July of 1989, when the appellant was reassigned from the agency's Yuma, Arizona office to the agency's Boulder City, Nevada Office.[3] This reassignment occurred approximately three weeks before the fire at the appellant's Yuma residence.

In 1990, the appellant sought review of his suspension by the Office of Special Counsel (OSC). However, on January 2, 1991, the OSC notified the appellant that it would take no further action on his complaint. The appellant was informed of his right to seek corrective action from the Board, and did so on March 7, 1991.

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[2] The parties are in agreement that the letter was erroneously dated March 13, 1990, and should have been dated April 13, 1990.

[3] It is undisputed that all of the "personnel actions" leading up to the appellant's reassignment, including the reassignment itself, were effected or proposed prior to July 9, 1989, the effective date of the Whistleblower Protection Act. Thus, they are not subject to review here under that Act. See *Herring V. Department of the Treasury*, 44 M.S.P.R. 673, 675 (1990), aff'd 918 F.2d 186 (Fed. Cir. 1990) (Table); *Marshall v. Department of Veterans Affairs*, 44 M.S.P.R. 28, 31-33 (1990).

Applicable law

In order to establish a claim of retaliation for whistleblowing, an employee must show that he made a protected disclosure and the disclosure was a "contributing factor" in the agency's decision to effect the personnel action. See 5 U.S.C. §1221(e)(1); *Christopher v. Defense Logistics Agency*, 44 M.S.P.R. 264, 271 (1990); *Gergick v. General Services Administration*, 43 M.S.P.R. 651, 569 [sic] (1990). Here, there can be no disagreement that the appellant's disclosures were a contributing factor in his 14-day suspension: the suspension action was specifically taken for those disclosures.[4] Thus, the issue before me is whether the appellant's disclosures as set forth in the notice of proposed suspension were "protected" disclosures under the Whistleblower Protection Act of 1989.

Analysis

The agency's suspension action can be divided into two parts. The first part relies on the appellant's repeated accusations of arson against Pritchett and Gudgel. Specifically, these accusations occurred on August 26, 1989 -- the night of the fire -- to police and fire officials; on the Monday following the fire in the request for a court injunction; in the September 11, 1989 letter to Secretary Manuel Lujan; and in March 1990, when the appellant sought to renew the injunctions against Pritchett and Gudgel.

The second part of the agency's suspension action involves the appellant's letter dated April 13, to prospective witnesses. The issuance of this letter raises different issues and will be discussed later.

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[4] The appellant cites earlier protected disclosures with regard to his several grievances with the agency. However, the appellant presented no evidence to show that these earlier disclosures were a contributing factor in the agency's decision to suspend him for 14 days. Moreover, it is not clear that the disclosures made are of the type which can be considered protected.

The central issue with regard to these accusations of arson against Pritchett and Gudgel is whether they constituted a violation of the law and weather the appellant reasonably believed he was reporting such a violation. *See* 5 U.S.C. §2302(b)(8). The test for such "reasonable belief" is not the subjective belief of the appellant/discloser. Rather, it is whether a "reasonable person in the appellant's position would believe that the matter reported was protected. *See Special Counsel v. Hoban*, 24 M.S.P.R. 154, 160 1984).[5]

Thus, the instant case must be examined not from the appellant's perspective, but from the perspective of a reasonable person, confronted with the appellant's circumstances and the evidence available to the appellant. And, based on the evidence presented, I find that a reasonable person could not have "reasonably believed" the accusations made.

To support his accusations, the appellant first alludes to a conversation he had with several fellow employees some 18 months before the fire. *See* Hearing Tape (the appellant's testimony). During this conversation, which involved Pritchett's alleged harassment, one of the fellow employees stated that Pritchett would stop at nothing, even burning a residence, to harass employees. *See* Id.

This statement, according to the appellant, formed the basis for his belief that Pritchett had committed arson. Yet, this fellow employee apparently did not provide any factual basis to support his supposition; it was apparently nothing more than an unsubstantiated opinion.

Moreover, as noted, while the appellant and Pritchett had been having difficulties in the workplace, no evidence has been produced to show that these difficulties ever occurred outside the workplace. That is, even assuming arguendo that Pritchett harassed the appellant, and I do not make this assumption, the appellant has presented no evidence to show that Pritchett had

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[5] I note that this case was issued prior to the Whistleblower Protection Act of 1989. However, the language of the statute requiring that the employee "reasonable [sic] believe" his disclosure is unchanged by the Act.

ever said or done anything to suggest that he was capable of such activities outside the mantle of work supervision.

The appellant next justifies his accusations by asserting that he was only cooperating with law enforcement officials. That is, the appellant claims that on the night of the fire, both the Fire Marshal and the investigating police officer suggested that the fire was arson and asked for the names of suspects. Thus, the appellant was only complying with these law enforcement officials by providing his supervisors' names.

However, while the appellant testified that he was asked to provide such information, he has submitted no evidence to show that the Fire Marshall or the Police Officer ever asked for such information on the night of the fire.[6]

In fact, the final police report indicates that the fire was due to "unknown" causes.[7] *See* Appeal Record, Tab 5-4AB. And, the report of the investigating police officer suggests that the appellant first raised the specter of arson, and that the appellant and his wife suggested that Pritchett and Gudgel might be involved. *See* ID.

More importantly, I note that the available evidence provided at least one alternative to arson and should have suggested caution to the appellant in making his accusations. First, the appellant had recently been reassigned from Yuma, Arizona, to Boulder City, Nevada. Thus, the appellant was no longer living in his former Yuma residence -- his daughter was-- and the evidence shows that Pritchett was not even aware of the

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[6] I note that the parties stipulated that the Fire Marshall found that the fire was arson. However, I am unable to find any evidence of this in the appeal record. Nor was I able to find any record of the appellant's conversation with the Fire Marshall on the night of the fire.

[7] During his testimony, the appellant indicated that insofar as the fire was arson, he had become the prime suspect because of certain discrepancies in his story and that he was deemed to have failed a lie detector test on the matter. See Hearing Tape (the appellant's testimony.)

appellant's presence in Yuma on the night of the fire. *See* Id.

Further, on the day of the fire, the appellant's son-in-law had cleaned the storage room where the fire started. See Id; see also Hearing Tape (testimony of Judy Kidd). This cleaning involved the stacking of paint and other combustible materials. While these chemicals were ultimately found not to be the cause of the fire, the possibility of such an occurrence was extant at the time of the fire.

I am also disturbed by the fact that on the Monday after the fire, and then some two weeks later when he wrote to Secretary Lujan, the appellant repeated his charge of arson without any apparent attempt to check with the police or fire department to ascertain the development of evidence. In fact, the appellant stated that he had been unable to secure a copy of the police report and did not see one until provided by the agency in its adverse action file. *See* Hearing Tape (the appellant and Judy Kidd's testimony). I note, however, that the agency was able to obtain a report of investigation without any apparent difficulty.

Having reviewed the appeal file and specifically the appellant's testimony at the hearing, I find not one scintilla of credible, probative evidence available either now or at the time f the fire, which would suggest that Pritchett and/or Gudgel were involved in the fire at the appellant's home. Thus, I find that a reasonable person could not have reasonably believed that Pritchett and Gudgel had started the fire at the appellant's home. As suggested by the agency in its closing argument, the appellant's statements appear to be unfounded suspicions rather than a reasonable belief.

Accordingly, I conclude that the appellant's accusations against Pritchett and Gudgel in this regard are not "protected disclosures" within the coverage of the Whistleblower Protection Act. And, because of this conclusion, I make no finding on whether the appellant's accusations were in the public interest - those types of disclosures Congress intended to protect through the Act -- or solely in his private interest. *See Berube v. General Services Administration*, 30 M.S.P.R. 581, 596 (1986) vacated on other grounds, 820 F2d 396 (Fed. Cir, 1987).

The appellant also argues that his communication letter to Secretary Lujan must be accorded protection "on its face" as 1st

Amendment free speech and a disclosure of a violation of the law. However, as found above, the appellant's accusations of arson are not "protected disclosures." and, the appellant's claim that his constitutional rights have been abridged, in and of itself, is insufficient to bring this matter within the Board's jurisdiction. *See Saunders v. Merit System Protection Board*, 757 F.2d 1288, 1290 (Fed. Cir. 1985) (the Board does not have plenary jurisdiction).

The final basis for the 14-day suspension is the appellant's letter to approximately 30 fellow employees who were to appear as witnesses at this grievance hearing. *See* Appeal record, Tab 4-4Q. In that grievance the appellant was attempting to show that he was being harassed. However, on the second day of the hearing, before calling many of the requested witness [sic] to testify, the appellant withdrew the claim of harassment.[8] *See* Appeal Record, Tab 5-4R (Vol 3 of the grievance transcript, pg. 130). Yet, he still wrote to these individuals to outline his continuing plans and to warn the employees of potential harassment.

Having reviewed this letter, I do not believe it contains a protected disclosure. *See* Appeal Record, Tab 4-4Q. Rather, the appellant is complaining of the agency's alleged harassment toward him rather than any disclosure of specific mismanagement. Nothing the appellant disclosed in this letter effectuated the purposes of 5 U.S.C. § 2302(b)(8). *See Berube*, 30 M.S.P.R. at 596. That is, any disclosures made involved only the furtherance of the appellant's case, not the public interest. Thus, I find that they were not protected disclosures. *See Williams v. Department of Defense*, 46 M.S.P.R. 549, 553-54 (1991); *Oliver v. Department of health and Human Services*, 34 M.S.P.R. 465, 472 (1987), aff'd 847 F.2d 842 (Fed. Cir. 1988) (Table)..

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[8] The parties stipulated to this matter but essentially agreed to disagree. My reading of the hearing transcript convinces me that the agency's position -- the appellant withdrew the claim of harassment -- is the correct one. *See* Appeal Record, Tabs 5-4R and 21.

Moreover, insofar as the appellant claims that the agency is retaliating against him under 5 U.S.C. § 2302(b)(9) -- reprisal for having written this letter in connection with his grievance, I disagree. The credible evidence of record shows that at the time the appellant wrote these letters he had withdrawn his grievance. Moreover, as with the appellant's constitutional claim, the allegation that the agency has committed a prohibited personnel practice is insufficient to bring this matter within Board jurisdiction. *See Hunter v. Department of the Army*, 40 M.S.P.R. 449, 451 (1989).

Finally, I note that the appellant alleges that the agency's actions against him constitute age discrimination. While it is not clear that the appellant is specifically raising this argument with regard to his 14-day suspension, I would simply note that the Board lacks jurisdiction over such an allegation in the absence of an appealable matter. *See Perlmutter v. Department of the Air Force*, 41 M.S.P.R. 38, 39 (1989). Thus, because the Board does not have jurisdiction over the appellant's 14-day suspension, or any of the other personnel actions taken against the appellant, it cannot consider this allegation of discrimination.

Summary and conclusion

In sum, I find that the appellant is not entitled to the protection of the Whistleblower Protection Act because the disclosures he made -- accusations of arson against his supervisors and the letter he issued to prospective witness -- are not protected by the Whistleblower Protection Act. That is, the appellant could not have "reasonably believed" the accusations of arson, and the letter he wrote to prospective witnesses was in his personal interest, not the public interest.

Further, the appellant's 14-day suspension, standing alone, is not an agency personnel action over which the Board had jurisdiction. *See* 5 U,S. C. § 7512(2); *Gosa v. United States Postal Service*, 43 M.S.P.R. 11, 13 (1989). The appellant's suspension was reviewed only because of his allegation that the personnel action was in retaliation for his whistleblowing activity. However, having found that the appellant is not a whistleblower, the appeal must be deemed as outside the Board's subject matter jurisdiction.

DECISION

The appeal is DISMISSED.

FOR THE BOARD:

Steven L. Chaffin
Administrative Judge